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No.____

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS.
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IN THE

Supreme Court of the United States

October Term, 1983

GEORGE X. SCHWARTZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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May, 1984

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36 PP

QUESTIONS PRESENTED

1. Whether the government's conduct of the ABSCAM operation violated the most basic standards of due process and fundamental fairness, reaching and exceeding that degree of outrageousness which mandates dismissal of this prosecution?

2. Whether a "bifurcated" entrapment instruction, which submits to the jury a question of law reserved to the court, shifts the burden of proof and potentially withdraws the entrapment defense from the jury's consideration, is constitutional error which must be reversed unless harmless beyond a reasonable doubt? And if so, whether such instruction in the instant case was harmless?

3. Whether, where the evidence of governmental inducement is overwhelmimg, the government can meet its burden to disprove entrapment when the only proof of predisposition offered is the fact that the defendant committed the criminal act, which proof demonstrates neither his pre-existing criminal inclination nor familiarity with criminal techniques and procedures, and was manufactured, in its entirety, by the government?

4. Whether, given the constitutional limitations inherent in Congress' power to legislate under the commerce clause, federal jurisdiction under the Hobbs Act can be predicated upon wholly fictitious facts and circumstances which could never have had, at any time, any actual or potential effect on interstate commerce, and which "facts," in any event, were formulated and injected into the transaction in question by the government?

5. Whether, under the Hobbs Act, criminal convictions for extortion can be sustained absent proof of a demand or request by the defendants charged?

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No.

IN THE
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GEORGE X. SCHWARTZ,
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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner above named respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this case on 21 February 1984, rehearing and rehearing *en banc* denied on 20 March 1984.

OPINIONS BELOW

The Third Circuit's order entered 28 March 1984, staying issuance of the mandate until 19 May 1984, is reprinted at PA-43.[1]

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[1] References to the Appendix to this Petition for Writ of Certiorari are designated "PA____".

The Third Circuit's order entered 20 March 1984, denying rehearing and rehearing *en banc*, is reprinted at PA-42.

The Third Circuit's judgment entered 21 February 1984, on re-appeal after remand and affirming the district court's entry on 31 January 1983 of judgment of conviction and imposition of sentence after remand, is reprinted at PA-41. The opinion of the panel of the Third Circuit filed 21 February 1984 (*per* Seitz, C.J.) ("*Schwartz II*") is not yet reported but is reprinted at PA-1.

The district court's judgment and imposition of sentence entered 31 January 1983 on remand (E.D. Pa., *per* Fullam, J.) is reprinted at PA-44.

The Third Circuit's opinion *en banc* filed 11 February 1982 (*per* Sloviter, J., Aldisert and Weis, J.J., dissenting) ("*Schwartz I*"), reversing the district court's order entered 26 November 1980 (setting aside the jury's verdict of conviction, dismissing the Hobbs Act conspiracy count and granting a judgment of acquittal *n.o.v.*), is reported *sub nom United States v. Jannotti*, 673 F.2d 578 (3rd Cir. 1981), *cert. denied*, 457 U.S. 1106, 102 S. Ct. 2906 (1982), *reprinted at* PA-47.

The district court's opinion and order entered 26 November 1980, setting aside the jury's verdict of conviction, *etc.*, is reported *sub nom. United States v. Jannotti*, 501 F.Supp. 1182 (E.D. Pa. 1980) (*per* Fullam, J.), *rev'd*, 673 F.2d 578 (3rd Cir. 1981), *cert. denied*, 457 U.S. 1106, 102 S.Ct. 2906 (1982), *reprinted at* PA-175.

JURISDICTION

The Third Circuit's judgment entered 21 February 1984 affirmed the district court's judgment of conviction and imposition of sentence on remand. Petitioner Schwartz' timely filed petition for rehearing and suggestion of rehearing *en banc* was denied by order entered 20 March 1984. The 60 days in which to file a petition for writ of certiorari ended on Saturday, 19 May 1984. The instant Petition for Writ of Certiorari, filed on or before 19 May 1984, is timely.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V, *reprinted at* PA-273.

The Hobbs Act, 18 U.S.C. §1951, *reprinted at* PA-273.

The Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. §1962, *reprinted at* PA-274.

STATEMENT OF THE CASE

A. *Procedural Background.*

Petitioner Schwartz, along with other Philadelphia ABSCAM victims, was indicted for conspiracy under the Hobbs Act (18 U.S.C. §1951) and RICO Act (18 U.S.C. §1962), and also for attempts to violate the Hobbs Act. The district court dismissed the attempt charges prior to trial and the government did not appeal. Schwartz was tried jointly with Philadelphia ABSCAM victim Harry Jannotti on the two conspiracy counts. After a six day jury trial, petitioner Schwartz was convicted of both the Hobbs Act and RICO conspiracy charges.[2]

After verdict, Schwartz and Jannotti moved for judgments of acquittal. By Memorandum and Order entered 26 November 1980, the district court set aside the verdict in its entirety, dismissed the Hobbs Act conspiracy counts for lack of jurisdiction, and granted the motions for judgment of acquittal. 501 F.Supp. 1182, PA-175.

The government appealed and the United States Court of Appeals for the Third Circuit, sitting *en banc*, reversed the district court's decision by a seven-to-two vote (*Schwartz I*, 673 F.2d 578, Pa-47) and directed reinstatement of the jury verdict.

Schwartz and Jannotti jointly petitioned this Court for a writ of certiorari (No. 81-1899, Petition for Writ of Certiorari), which the United States opposed on the ground that review by this Court at that time was premature because judgment and sentence had not then been imposed (*id.*, Memorandum for the United States in Opposition). This Court denied certiorari. 457 U.S. 1106, 102 S.Ct. 2906 (1982).

On remand by the Third Circuit to the district court, the district court denied Schwartz' additional post-trial motions, reinstated the jury's verdict and entered judgment and imposed sentence. PA-44. On a second appeal, the Third Circuit affirmed. *Schwartz II*, ____ F.2d ____, PA-1. This timely petition for writ of certiorari followed.

B. *Factual Background.*

ABSCAM was conceived in 1978 by F. B. I. agents in New York along with a career swindler and convicted felon, Melvin Weinberg. Originally, ABSCAM was designed to recover stolen property, but it evolved into a government-backed endeavor to bribe public officials, thus changing the government's role from that of a traditionally passive buyer of stolen property to an aggressive instigator, seeking out officials and offering bribes to them.

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[2] Co-defendant Harry Jannotti was convicted by the jury of the Hobbs Act conspiracy but acquitted of the RICO conspiracy.

ABSCAM was characterized throughout by clever strategies and substantial inducements—the "honeypot" according to Weinberg—designed to attract potential targets of the scheme. Substantial legal fees, lucrative investment opportunities, and large amounts of money were offered to the victims of the scheme, and the impression of an Arab shiek with vast amounts of money to spend freely was continually fostered by the F. B. I. Likewise, the F. B. I. agents repeatedly and effectively employed the concept of "the Arab mind" or "the Arab way of doing business"[3] to persuade their victims that they must accept the money offered to them to convince the fictitious sheik of their friendship.

The government also recruited and used "middlemen" to assist in the scheme, among them Howard Criden, a Philadelphia lawyer who brought both petitioner Schwartz and Harry Jannotti into the ABSCAM net. Criden, as were various other middlemen, was compensated by contingent fee based upon the number of officials he could produce for the government. He also received continuing promises of substantial, future legal fees and other lucrative investment opportunities. Criden was early taught that the officials who were brought in to meet the sheik's "associates"—the F. B. I. agents—need only come on strong and emphasize their importance, but that no official would be called upon to perform. *See* PA-197-201. The F. B. I. accepted without question Criden's representations regarding the honesty and reputations of public officials whom he was to produce, despite knowledge that on at least one occasion

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[3] For the District Court's discussion of the "Arab mind" technique and the manner in which it was employed, see PA-197-198.

Criden had attempted to deceive them in order to obtain one of his contingent fees.

The Philadelphia aspect of ABSCAM was a limited concession to the lobbying of the local United States Attorney, and was designed to test the integrity of city officials.[4] No infiltration or discovery of ongoing criminal activity took place or was intended. Rather, the government created a criminal enterprise and actively attempted to involve innocent persons in its operations. The scenario centered upon the sheik's plan to construct a fictitious $35 million hotel in Philadelphia, with its resultant, major impact on the city's economy. But the record is devoid of any evidence that payments of money to any city official were either sought or required by anyone other than the government, or that any Philadelphia official would have to be "dealt with" in connection with the proposed hotel project.

On 18 January 1980, Criden met with F. B. I. Agent Michael Wald, who passed himself off as a representative of the fictitious sheik.[5] Wald pressed Criden for introductions to various municipal officials. He specifically requested a meeting with petitioner Schwartz and Councilman Louis C. Johanson, Criden's law partner, despite Criden's protestations that their assistance was unnecessary given the sheik's prior relationship with two Philadelphia congressmen. Wald unilaterally raised the issue of payments and agreed to pay Criden $10,000 for the production of Schwartz and Johanson. Criden had never met nor had any prior dealings with Schwartz.

Later that day, Johanson met with Wald. He agreed to support the hotel project and accepted a $25,000 payment. At the end of the meeting, Wald gave Criden $5,000 and promised him "5 for the next delivery." Johanson testified that, based on his earlier meeting with Criden, he thought the payment was a retainer for legal services which his law firm would perform on the hotel project. Johanson also testified that as the meeting progressed, he became aware that it "wasn't kosher." Later, and because he thought he had been duped by Criden, Johanson refused a request by Criden for an introduction to Schwartz or Jannotti, since he felt they were good men whom he did not want to involve in improper activities.

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[4] The Philadelphia U. S. Attorney testified that his office actively lobbied for an opportunity to conduct a Philadelphia ABSCAM operation, attempted to devise strategems to justify bringing ABSCAM to the city, and formulated a scenario which would result in violations of federal law.

[5] The meeting with Criden, as were the meetings with petitioner Schwartz and Harry Jannotti, was videotaped by the government.

On 23 January 1980, Schwartz met with Criden and Wald.[6] During the meeting, Schwartz repeatedly pitched Philadelphia, told Wald that the "climate is good" for a major construction project, and noted that any problems arising in connection with a proper and legitimate project could be overcome administratively. Schwartz also advised Wald of his power and influence within City Council and that he, Schwartz, had previously rendered assistance to other developers of major construction projects in Philadelphia. Wald assured Schwartz that the project was a legitimate one but emphasized that, if the project was to be built in Philadelphia, he must have Schwartz' assurance that there would be no problems. Schwartz repeatedly advised that no guarantees could be given but that, as long as the project was legitimate, any problems could be resolved.

Significantly, when Wald first mentioned payments, Schwartz made it clear that money was not the motivating factor behind his agreement to assist with the project. Throughout the meeting, Schwartz discussed the available financing opportunities and the best law firms to employ in connection with the project. Near the end of the meeting, Wald again told Schwartz that he must have Schwartz' unequivocal assurance that everything could be taken care of if he was to report to the sheik that the hotel project could be placed in Philadelphia. Schwartz reiterated that he "cannot give you a guarantee that there won't be any problems" but that so long as the project was legitimate, administrative procedures in Philadelphia could assist in resolving those problems. At the end of the meeting, a payment of $30,000 was given to Schwartz. Wald then gave Criden $5,000 for delivering Schwartz and urged Criden to deliver Harry Jannotti.[7] Although, as with Schwartz, Criden did not know Jannotti prior to the meeting, Criden boasted on tape to Wald that he knew Jannotti well. The F. B. I. did not attempt to verify Criden's plainly false assertions of knowing Schwartz, and it did nothing to verify his assertions concerning Jannotti.[8]

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[6] Criden had obtained an introduction to Schwartz through a mutual friend, Philadelphia Common Pleas Court Judge Thomas Shiomos. Shiomos testified that Criden told him that Criden's clients wanted to hire Schwartz as a consultant and to pay Schwartz for his advice and that he, Shiomos, told this to Schwartz. Judge Shiomos testified that he saw nothing "improper or fishy" in this proposal and so advised Schwartz. PA-205-206.

During the trial, the government placed almost total reliance on the video tapes. It presented no independent proof of any actual or potential effect on interstate commerce as a result of petitioner's conduct and, aside from the acts of its own agent, Criden, presented no evidence of a "pattern" of racketeering. Likewise, the government introduced no evidence that petitioner sought, requested

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[7] Also, during this meeting between Criden and Wald, Wald pressed for introductions to other city officials with whom he could "deal," naming, among others, the mayor and the former mayor of the city of Philadelphia and various councilmen.

[8] On 24 January 1980, Criden produced Jannotti for the hidden cameras. During the Jannotti meeting, and following an initial discussion of the hotel project, Jannotti was repeatedly told by the F.B.I. of the requirments of the "Arab mind," and that the sheik insisted upon making friends and resolving problems before they arose. Wald asserted that the "Arab mind" required that Jannotti accept the payment of money to prove his friendship if the sheik was to construct the hotel in Philadelphia.

(footnote continued)

or otherwise affirmed the need for any payment of money in exchange for official services. Finally, the government introduced no extrinsic evidence of petitioner's predisposition, but relied solely upon the events of the meetings and strained inferences from other peripheral evidence to prove predisposition.

REASONS FOR GRANTING THE WRIT

It is petitioner's position that the creation of crime is an insidious and immoral business and that the government has no place in it. For this and the other reasons set forth below, granting of the writ requested is essential.

The Government's Conduct of ABSCAM Violated the Most Basic Standards of Due Process and Fundamental Fairness, Reaching and Exceeding That Degree of Outrageousness Which Mandates Dismissal of This Prosecution.

The district court in this case applied the "demonstrable level of outrageousness" standard set down in *Hampton v. United States*, 425 U. S. 484, 495 n. 7 (1976) (Powell, J., concurring), and held that the government's conduct and activities in ABSCAM exceeded permissible limits. Petitioners submit that a review of this record will confirm that the district court was correct. Due process in the context of criminal proceedings

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8.—*(continued)*

Jannotti repeatedly expressed his interest in the project, his feeling that the project would be a great benefit to the city, and his support for the hotel because it was a legitimate project. However, each time that Jannotti showed reluctance to accept money, the F.B.I. agent increased the intensity of his presentation until ultimately Jannotti accepted a $10,000 payment. Once Jannotti left, the F. B. I. agents, obviously frustrated because of Jannotti's demeanor and lack of understanding or interest in the proffered payment, expressed their displeasure to Criden.

has received only limited treatment by this Court,[9] but numerous courts of appeals have applied due process concepts,[10] and in several instances have reversed criminal convictions on this very ground.[11] Every factor found relevant to the due process analysis by every court of appeals that has considered the issue is present here in the extreme.

The government instigated, suggested, set in motion, and "scripted" the entire ABSCAM scheme. Governmental involvement was pervasive and extended over the entire period of the scheme. The nature of that involvement was singularly and unfairly designed to lure innocent persons into the net. No evidence of ongoing criminal conduct by petitioner (or any other Philadelphia ABSCAM victim) was present when ABSCAM was injected into his life, nor did any evidence exist of any prior or continuing criminal activities of this type in Philadelphia municipal government at the time the ABSCAM operation arrived. No evidence of petitioner's predisposition, aside from some "puffing" in the course of the governmentally-scripted meetings, was presented by the prosecution during trial. Rather, extreme inducement was brought to bear on all the victims of the Philadelphia ABSCAM operation through the offer of substantial sums of money, the use of the "Arab mind" ruse, and the government's appeal to the victim's civic duty through representations that, unless money was accepted to evince friendship for the sheik, the hotel project would not be placed in Philadelphia.

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[9] *See Sorrells v. United States*, 287 U. S. 435, 459 (1932) (Roberts, J., separate opinion); *Sherman v. United States*, 356 U. S. 369, 381 (1958) (Frankfurter, J., concurring); *United States v. Russell*, 411 U. S. 423 (1973); *Hampton v. United States, supra*. *See also Olmstead v. United States*, 277 U. S. 438, 485 (1928) (Brandeis, J., dissenting); *Casey v. United States*, 276 U. S. 413 (1928) (Brandeis, J., dissenting).

[10] E.g., *United States v. Bocra*, 623 F. 2d 281 (3rd Cir.), *cert. denied*, 449 U. S. 875 (1980); *United States v. Prairie*, 572 F. 2d 1316 (9th Cir. 1978); *United States v. Johnson*, 565 F. 2d 179 (1st Cir. 1977), *cert. denied*, 434 U. S. 1075 (1978); *United States v. Leja*, 563 F. 2d 244 (6th Cir. 1977), *cert. denied*, 434 U. S. 1074 (1978); *United States v. Reifsteck*, 535 F. 2d 1030 (8th Cir. 1976). And see cases cited *infra* at footnote 11.

[11] *E.g.*, *United States v. Twigg*, 588 F. 2d 373 (3d Cir. 1978); *United States v. Archer*, 486 F. 2d 670 (2d Cir. 1973); *United States v. Russell*, 459 F. 2d 671 (9th Cir. 1972), *rev'd* 411 U. S. 423 (1973); *Greene v. United States*, 454 F. 2d 783 (9th Cir. 1971); *see United States v. West*, 511 F. 2d 1083 (3d Cir. 1975).

The F. B. I. employed middlemen who were paid on a contingent fee basis, a tactic condemned by the Fifth Circuit in *Williamson v. United States,* 311 F. 2d 441 (5th Cir. 1962), *on appeal after remand,* 340 F. 2d 612 (5th Cir.), *cert. denied,* 381 U. S. 950 (1965). It was totally unconcerned with the methods and ploys used by these middlemen to convince persons to participate in the meetings, despite knowledge of prior deception and unconscionable coaching by these very same middlemen. Thus, the government went to extraordinary lengths to create the inducement which preyed upon the weakness of its targets.

The government's conduct throughout ABSCAM was the antithesis of fair and effective law enforcement. There was no reason to suspect either a propensity to engage in criminal conduct on the part of petitioner or the presence of any ongoing criminal activity involving petitioner. Yet, the government directed Criden to inject himself into the petitioner's life with the deliberate intent to lure him into criminal activity and with a conscious design to corrupt him.

The Third Circuit erroneously minimized the significance of the government's activities in ABSCAM by isolating them one from the other. In *Greene v. United States, supra,* the Ninth Circuit recognized that

> "taken individually, none of the factors which we have pointed to as significant would necessarily require reversal of a conviction. *[But in] our view, it is*

> *the combination which is important.*" 454 F.2d at 787 (emphasis added).

The totality of factors present here mandates a ruling in petitioner's favor.

Further, in its analysis of the due process question, the Third Circuit improperly mixed concepts of entrapment and due process, failing to recognize the constitutional underpinnings of the due process defense. For example, although proof that the government had no reason for approaching a victim may be irrelevant in the entrapment context (PA-110), it is and must be a factor in any due process analysis. Similarly, although in the view of the Third Circuit the inducements offered to petitioners by the government may not have been sufficient to sustain an entrapment defense (*see* PA-108), these same inducements may, when viewed in conjunction with the entire scope of unfair governmental activity, be a substantial factor in supporting a due process defense.

Even if, as argued the Third Circuit, the government may employ secretive tactics and deliberate strategems to ferret out dishonesty among public officeholders, that fact does not sanction the government's instigation, control, and total orchestration of the very criminal activity which it intends to prosecute. In every other case in which the due process defense has been denied, governmental involvement in criminal activity has been passive and the basic criminal design has, in each instance, been conceived and carried out in all material respects by the defendants themselves. In none of those cases has governmental instigation of or involvement in criminal conduct risen to the levels which are present in the Philadelphia ABSCAM case.

Here, the government defined the nature of the scheme in an attempt to create the jurisdictional fact—interstate commerce—which would permit it to prosecute this case in the federal courts. In the same manner, the government, through its manipulation of its captive middleman, Criden, constructed a pattern of bribery which would not have existed but for Criden's presence throughout the scheme.[12] Further, the conduct and language of the F.B.I. agents were deliberately ambiguous and misleading. Indeed, at no time did the government ever ask petitioner whether the payment of bribes was necessary. Moreover, at no point did the government seek to elicit petitioner's understanding of the purpose of the meetings. One must conclude that the agents feared that an explicit approach would have resulted in the flight of their victim.

Finally, a review of the Third Circuit's opinion in *Schwartz I* reveals an extraordinary misconception of the role of the judiciary in our society. In the view of the majority, it is *not* the judiciary's function to determine the constitutional limitations under which our law enforcement agencies are to operate. According to Judge Sloviter:

> "[T]he conduct of agents of the executive branch who must protect the public from crime is more appropriately considered through the political process where divergent views can be expressed in the ballot box." PA-112.

This manifests a total abnegation of the judiciary's obligation to define and enforce the rights of citizens under the Constitution.[13] If this Court will not establish a national benchmark defining limits on law enforcement activity of this type, no citizen will be secure from the clandestine imposition of morality tests conceived and administered by the federal bureaucracy for purposes ranging from the appeasement of overly zealous police-egos to chilling political intimidation.

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[12] The district court found that the government, through the involvement of its own "agent," Criden, created, initiated, and instigated the pattern of bribery "as well as each bribe" upon which the RICO charge is premised, solely to satisfy the requirements of RICO and to permit the exercise of federal jurisdiction over fabricated state bribery charges. Reasoning from *United States v. Archer, supra*, Judge Fullam held that absent the government's injection of these elements into the scheme, no proof of a pattern of racketeering activity under 18 U.S.C. §1962(c) could be shown, thereby requiring dismissal of the charges on the ground of manufactured jurisdiction. PA-221. The Third Circuit never addressed this issue.

The District Court's "Bifurcated" Entrapment Charge Erroneously Submitted To The Jury A Question Of Law Reserved To The Court, Shifted The Burden Of Proof To The Defense, And Potentially Withdrew From The Jury Petitioner's Crucial Entrapment Defense. This Comprised Constitutional Error But The Third Circuit Abnegated *Chapman's* "Harmless Beyond A Reasonable Doubt" Standard.

Entrapment was a crucial defense to petitioner Schwartz, to the benefit of which, on the trial record, he was entitled as a matter of law, and as to which he was equally entitled to have the jury fairly and adequately instructed. The district court determined that sufficient evidence had been adduced to warrant giving an entrapment charge, but erroneously gave a "bifurcated" charge,[14] incorrectly focusing the jury's deliberations extensively and primarily on the threshold question of inducement and only secondarily on the central, determinative question of predisposition.[15] It discussed at length the facts and opposing arguments relating to inducement and "repeatedly" (*Schwartz II*, ____ F.2d at

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[13] As Judge Aldisert recognized in his dissent:

"[T]he philosophical difference that divides this court depends upon a judge's unspoken notions about the role of the courts. If he or she views the role of the court as a passive one, he or she will be willing to delegate the responsibility for unpopular issues to the jury and not care greatly what the result may be. If he or she views the court as an instrument of society designed to reflect in its decisions the highest values of the American legal tradition, he or she will be more likely to risk public disapproval and to measure an unpopular cause against the highest ideals and aspirations of the time.

"The rights conferred upon our society by judges of the Third Article emanated from cases in which the defendants were unpopular and generally regarded as transgressors—Dollree Mapp, Danny Escobedo, and Ernesto Miranda quickly come to mind. In each case, a court, not a jury, drew the line of demarcation between permissible and impermissible police conduct to insure that enforcers of society's laws would not violate established moral frontiers while exercising their stewardship; it was federal judges, unmindful of editorials and broadcast plaudits, who chose to stand tall and unbending." PA-126. (footnote omitted).

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[14] The district court's "bifurcated" entrapment charge submitted to the jury: (1) the threshold question whether the defense had produced sufficient evidence of governmental initiation of the criminal activity charged, and wrongful inducement of petitioner Schwartz into that activity, as to merit an entrapment defense; and (2) if so, the question whether the prosecution had produced evidence sufficient to persuade the jury beyond a reasonable doubt that Schwartz had been predisposed to commit the activity any way. The court instructed the jury that if it did not *find* inducement, it need not consider predisposition. The court thus shifted the burden of proof to the defense and instructed the jury to withdraw entrapment from its consideration if the defense had not proven inducement. *Schwartz II*, ____ F.2d ____, slip op. at 18-21, PA-18-21.

Discussing the evidence, the district court indicated that inducement might be found from Howard Criden's maneuvers to gain Schwartz' attendance at the meetings and other activities, but that was only chargeable against the government if the jury also found that Criden was the government's agent. The court also stated that the jury might find inducement from the acts of the F.B.I. undercover agents themselves at the meetings. PA-244-245.

[15] The court's charge on entrapment comprises approximately 18 pages in the trial transcript (PA-243-253, 262), some 15 of which are devoted to the threshold question of inducement (PA-243-251, 253, 262) and only 3 of which are devoted to the central, determinative question of predisposition (PA-251-253). The court told the jury to "draw a sharp line" (PA-244) between the government merely providing an opportunity to commit crime and inducing "an innocent defendant" (*ibid.*) to commit crime.

The district court's entire charge to the jury, including its supplemental charge after side-bar objections and further supplemen-

(*footnote continued*)

____, slip op. at 20, PA-20) instructed the jury that the real issue to be determined was inducement.[16]

In so doing, the district court allowed the jury to second-guess a threshold question of law reserved to the court. Further, the court shifted to petitioner Schwartz an affirmative burden of proof on the question of inducement, but the court gave the jury no standard of measure or quantum of proof by which to judge whether the evidence was sufficient to support the *finding* of inducement which it instructed them to make.[17] Thus, the court opened to the jury a path to conviction which, if the jury should travel it, withdrew the critical defense of entrapment from the jury's consideration even though on the evidentiary record petitioner was entitled to the defense as a matter of law.

The presumption of innocence is an axiomatic, fundamental proposition of constitutional dimension in our

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15.—*(continued)*
tal charge upon entertaining a question from the jury, is reprinted at PA-229. The portions of the charge dealing with entrapment issues are found at PA-243. The Third Circuit's discussion and treatment of the district court's entrapment charge is found in *Schwartz II*, ____ F.2d ____, slip op. at 16-22, PA-16-22.

[16] PA-243 ("[t]he issue really is" inducement), 250 ("the issue here is simply" inducement), 253 ("the specific question" is inducement), 262 ("[i]f you find" inducement).

[17] The district court instructed the jury that before the government's burden to disprove entrapment by proving petitioner Schwartz' predisposition beyond a reasonable doubt was triggered,

> "the evidence must lead you to believe that the Government induced the defendant to commit the crime charged." PA-243.
>
> . . .
>
> "If you find from the evidence that there was inducement, . . . that is, if you accept as correct the inferences urged upon you be defense counsel . . ., if you find those facts to be correct, then that would amount to inducement and you would therefore acquit the defendants unless the evidence as a whole satisfies you beyond a reasonable doubt that they were predisposed." PA-262.

criminal jurisprudence. Equally axiomatic, fundamental and constitutionally impelled is the rule that the evidence need only admit of a reasonable doubt to gain the defendant's acquittal. *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 1933 (1978). There was no question by the Third Circuit that the evidence fairly raised the spectre of entrapment and that petitioner was entitled to an instruction focused on the factual question of predisposition and explicitly placing the burden on the government to prove predisposition beyond a reasonable doubt. Operation of the presumption of innocence in combination with the burden of persuasion then entitled petitioner to acquittal in the mere presence of a reasonable doubt as to his predisposition.

By placing the burden of proof on petitioner Schwartz and requiring of the jury an affirmative finding of inducement, instead of simply the presence of a reasonable doubt as to predisposition, the district court compromised the presumption of innocence and denied petitioner the full benefit of the reasonable doubt standard. *See, e.g., Davis v. United States*, 160 U.S. 469, 16 S.Ct. 353 (1895) (in federal murder prosecution, evidence fairly raised issue of insanity; *held* presumption of innocence then entitled defendant to acquittal upon reasonable doubt as to sanity); *United States v. Reed*, 658 F.2d 1225, 1236-1239 (7th Cir. 1981) (conflicting evidence merited charge on withdrawal from conspiracy; erroneous withdrawal instruction shifting burden to defendant and requiring finding of withdrawal, not merely reasonable doubt as to membership, *held* prejudicial and reversible error); *Berrier v. Egeles*, 583 F.2d 515, 517-518 (6th Cir.) (shifting burden to defendant to prove self-defense *held* constitutional error comprising plain error cognizable in collateral attack on conviction despite failure to object below), *cert. denied*, 499 U.S. 955, 99 S.Ct. 354 (1978); *United States v. Corrigan*, 548 F.2d 879 (10th Cir. 1977) (instruction on affirmative defense of self-defense which "suggests that the burden is on the defendant" *held* compromised beyond-a-reasonable-doubt standard and reversible error); *United States v. Alston,* 551 F.2d 315 & 316 n.9 (D.C. Cir. 1976) (instruction on affirmative defense of alibi suggesting burden shifted to defendant *held* "error of constitutional dimension" and not harmless beyond a reasonable doubt). And by creating the potential for withdrawing the entrapment defense when the issue was fairly raised by the evidence, the district court potentially denied due process by denying the benefit of the jury's informed consideration (upon proper instruction) of a defense to which the defendant was entitled as a matter of law. *United States v. Benavidez,* 558 F.2d 308 (5th Cir. 1977) (court's inadvertent neglect to charge on entrapment when evidence fairly raised the issue *held* constitutional, plain error cognizable on appeal despite failure to object below).

The district court thus injected constitutional error into the trial. Because of the trial court's erroneous entrapment instruction, "the jury was not in a position to fairly evaluate the defendant's case" (*Benavidez, supra,* 558 F.2d at 310). Although on the evidence "the issue was fairly raised [it] could not be fairly decided" *(ibid.)*, and petitioner Schwartz was denied the fair trial to which he was constitutionally entitled.[18] On appeal, the

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[18] Controlling precedent in the Third Circuit expressly condemned the type of bifurcated entrapment charge given by the district court here. *United States v. Watson,* 489 F.2d 504 (3rd Cir. 1973); *Government of the Virgin Islands v. Cruz,* 478 F.2d 712, 716-718 (3rd Cir. 1973). Moreover, at least until the instant decision, the Third Circuit clearly considered the error in a bifurcated entrapment charge to be not only constitutional error, but to be rendered so inherently prejudicial by the shifting burden and potential for confusion as to require reversal *per se*. *Watson, supra,* 489 F.2d at 510-511 & n.10; *Cruz, supra,* 478 F.2d at 718 n.7. *See United States v. Booz,* 451 F.2d 719, 723-724 (3rd Cir. 1971) (potential for jury confusion as to shifting burden of proof under charge on alibi defense coupled with failure specifically to instruct on prosecutor's burden to disprove defense *held* reversible error *per se).*

Third Circuit was required to determine whether the error was harmless beyond a reasonable doubt. *Chapman v. State of California*, 386 U.S. 18, 87 S.Ct. 824 (1967); *United States v. Alston*, 551 F.2d 315, 316 & n.9 (D.C. Cir. 1976). The Fifth, Sixth and Ninth Circuits require *per se* reversal for such erroneous entrapment charges. *United States v. Wolffs*, 594 F.2d 77, 79-84 (5th Cir. 1979); *United States v. Tate*, 554 F.2d 1341, 1343-1345 (5th Cir. 1977); *United States v. Ambrose*, 483 F.2d 742, 753 (6th Cir. 1973); *United States v. Dearmore*, 672 F.2d 738, 740-741 (9th Cir. 1982); *Notaro v. United States*, 363 F.2d 169 (9th Cir. 1966).

In conflict with applicable decisions of this Court, in direct conflict with decisions in the Fifth, Sixth and Ninth Circuits, and in defiance of precedent within its own circuit (note 18 *supra*), the Third Circuit panel in *Schwartz II* not only declined to invoke a *per se* rule of reversal but refused even to acknowledge the constitutional dimension of the error, and thus refused to apply *Chapman's* "harmless beyond a reasonable doubt" standard. *Schwartz II*, ____ F.2d ____, slip op. at 21-22, PA-21-22. This Court's exercise of certiorari jurisdiction is necessary to resolve the conflict thus created.

Applying its test for the harmlessness of non-constitutional error, the Third Circuit held that the district court's erroneous instructions on entrapment were harmless because inducement was "patent" from the fact that the government had created "an elaborate fiction", and because the government's evidence (the videotapes of the meetings) "overwhelmingly" established predisposition by showing that petitioner readily assented to take the money. *Schwartz II*, ____ F.2d ____, slip op. at 21-22, PA-21-22. But the district court submitted the inducement question to the jury for determination as a disputed fact, and clearly told the jury that it was free to decide that question against petitioner

Schwartz.[19] PA-244-248, 250-251, 256. Moreover, the court instructed that the jury must affirmatively *find* inducement before the government's burden to prove predisposition beyond a reasonable doubt would be triggered (PA-243, 253, 262), thus creating the real potential for the entrapment defense to be withdrawn from the jury's consideration. As to predisposition, the district court was not so convinced of the "overwhelming" nature of the evidence as was the Third Circuit. The court instructed the jury that there was "little or no evidence of predisposition other than the fact that the defendant did indeed accept the money without too much argument . . . ." PA-252. And in its order setting aside the jury's verdict of conviction, the district court held that the evidence was insufficient to prove predisposition beyond a reasonable doubt. PA-223. It cannot be said on this record that the evidence of predisposition was so overwhelming as to render the constitutional error in the instructions harmless beyond a reasonable doubt. This Court's grant of certiorari jurisdiction is therefore necessary to clarify the application of the *Chapman* standard to instructional errors such as were committed here.

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[19] The factual question whether Criden was an agent of the government was intimately tied to the inducement issue. The district court told the jury that it could look to the acts of Criden as evidence of inducement, but only if it found that Criden was an agent of the government. PA-244-245, 250. Under the court's instructions, the jury was free to conclude that Criden was merely an independent intermediary whose actions were not chargeable against the government, and thus to find no inducement. PA-244-245. In that event, the jury would not determine whether the prosecution had proven predisposition beyond a reasonable doubt and the entrapment defense would be withdrawn.

Where the Evidence of Governmental Inducement Is Overwhelming, the Government May Not Rely Upon Evidence of "Ready Acquiescence" Manufactured by It to Meet Its Burden, Nor Can a Court Sustain a Conviction in an Entrapment Case on Proof of Commission of the Criminal Act Alone.

Although recognizing that under the law of entrapment it is the government's burden to prove predisposition beyond a reasonable doubt, the Third Circuit ignored this standard of proof and permitted the verdict below to stand on evidence of the commission of crime alone. If the court's ruling is not reversed, the entrapment defense will have been obliterated.

Predisposition involves a difficult inquiry into the defendant's subjective state of mind. "[T]he controlling question [is] whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Sorrells v. United States,* 287 U. S. 435, 451 (1932). Subsumed within any discussion of entrapment is the complex, intertwined relationship between inducement and predisposition. As the Third Circuit itself recognized in *United States v. Watson,* 489 F. 2d 504 (3d Cir. 1973):

> "[T]he stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the inducement rather than to the defendant's own predisposition," *Id.* at 511.

The extraordinary degree of governmental inducement in this case has already been reviewed. Given evidence of these overwhelming inducements, the government's evidentiary burden to prove predisposition was susbstantial. But the majority in *Schwartz I* abjured any necessity to conduct a review of the entire record, despite its profession of the appropriateness of such a procedure. PA-87-99. Instead, as Judge Aldisert pointed out, it satisfied itself with a rebuttal of the items relied upon by the district court in entering judgment of acquittal. PA-138-139. In so doing, the court again relieved the government of *its* obligation to prove predisposition by good and sufficient evidence and effectively shifted the burden of disproof onto petitioner. Petitioner submits that a review of the record will plainly demonstrate that not a scintilla of evidence exists to establish the requisite predisposition, let alone to counterbalance the weight which must be accorded to the uncontradicted proof of massive governmental inducement.

Second, although appreciating that predisposition has been historically proven by, for example, proof of a defendant's prior convictions, his participation in similar transactions or proof of bad character, the *Schwartz I* majority made the startling observation that since "[s]uch evidence would be extremely difficult to produce in the case of acceptance of a bribe by a public official . . . the very acceptance of a bribe by a public official may be evidence of a predisposition to do so when the opportunity is presented." PA-99-100.

Proof of the criminal act, a fact which must be admitted of necessity by a criminal defendant arguing entrapment, is thus, for the Third Circuit, enough when it is a public official who is in the dock. No basis for the application of such a double standard exists in our law.

Further, even if one accepts the Third Circuit's abstract proposition that the demeanor of the petitioner during the commission of the criminal act is sufficient proof upon which to premise a finding of predisposition, attention must be directed to the nature of that proof which was presented at trial.

In this case, the government created the scheme, sent out its agent, Criden, to recruit the victims of the scheme, enticed the petitioners to attend staged meetings, orchestrated and scripted every aspect of those meetings, and controlled the flow of conversation to the extent that the petitioners' statements were always made in response to continuously monitored specific inquiries of the government. The conduct and conversation of the government's agents at the meetings were admittedly designed for the sole purpose of obtaining evidence to be used in a future proceeding. Nevertheless, it is this very evidence and only this evidence—this demeanor of petitioner at the meetings—which the government now contends is sufficient to satisfy its burden of proof of predisposition.

No logic exists which would justify a finding that the government may mold and manufacture the "ready response" evidence and then rely upon this evidence as the sole proof of predisposition. In no case in which proof of governmental inducement was as overwhelming as in this case has any court permitted a conviction to stand on the flimsy "ready acquiescence" evidence presented here. Here, petitioner neither said nor did anything tending to establish pre-existing criminal inclinations, nor demonstrated previous experience with similar criminal activity. In short, there was no evidence to show that when the government's overtures first came to the attention of Schwartz that he was already predisposed to accepting bribes.

At bottom, the court's rejection of the entrapment defense rests upon the simplistic notion that all petitioner had to do when offered the money was to say "no thanks." PA-104. Such an approach to the difficult jurisprudential problem raised by this case is wholly unacceptable. Peeling away the veneer of language in the court's opinions in *Schwartz I* and *Schwartz II*, one finds only the proposition that petitioner must be punished for immorality, and the defense of entrapment must be seriously compromised or, indeed, eradicated to achieve this result.

The Third Circuit's Ruling on Hobbs Act Jurisdiction in This Case Conflicts With the Rulings of Three Courts of Appeals, Impacts on All Federal Criminal Legislation Enacted Under the Commerce Clause, Misapplies Prior Holdings of This Court, and Is Erroneous Under the Facts of This Case.

The interstate commerce requirement in the Hobbs Act, 18 U.S.C. §1951, is a jurisdictional prerequisite to any prosecution under that Act. As this Court held in *United States v. Feola*, 420 U.S. 671, 695 (1975), in an analogous circumstance, "[t]he jurisdictional requirement is satisfied by the *existence of facts* . . . ." (Emphasis added). In its decision below, the Third Circuit completely disregarded this fundamental concept, established a standard of proof directly in conflict with the standards employed by the Fourth, Seventh, and Ninth Circuits, sustained a conviction for Hobbs Act conspiracy where no jurisdictional fact was or could have been proven, misinterpreted this Court's prior decisions in *Feola* and *Perez v. United States*, 402 U.S. 146 (1971), and demonstrated a basic misunderstanding of the jurisdictional limitations inherent in all federal legislation. Because the Third Circuit's determination, in the Hobbs Act context, as to the extent of Congress' power under the commerce clause "will have ramifications for all federal criminal statutes enacted under Congress' commerce clause power" (PA-72), review of the Hobbs Act issues raised herein is imperative.

First, in *United States v. Staszcuk*, 517 F.2d 53 (7th Cir.) (*en banc*), *cert denied*, 423 U.S. 837 (1975), Judge, now Justice, Stevens addressed the interstate commerce issue raised by the Hobbs Act, and held:

> "[T]he statutory language [of the Hobbs Act] . . . requires the prosecutor to prove some connection with interstate commerce in every case. We hold, however, that the commerce element of a Hobbs Act violation — *the federal jurisdictional fact* —

> may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce. . . . *[J]urisdiction in the particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce.*
>
> *"The jurisdictional inquiry must, of course, focus on the situation at the time of the offense." Id. at* 59-60. (Emphasis added) (Footnotes omitted).

Since 1975, the "realistic probability" test enunciated in *Staszcuk* has continued to be the law in the Seventh Circuit and has been adopted and uniformly applied by the Fourth and Ninth Circuits.[20]

In this case, the government-created scheme was wholly fictitious. The government did not prove at trial that, had the scheme been carried out, commerce would have been affected.[21] Likewise, since the government, through its agents, never had any intention to implement the scheme, there never existed any realistic possibility that the charged conspiracy would ever have an effect upon interstate commerce. Despite these undisputed facts, the Third Circuit held that where a defendant's conduct constitutes "a sufficient threat to interstate commerce so as to implicate an 'area of federal concern'," federal jurisdiction is established. *Schwartz I*, 673 F.2d at 592, PA-75. Thus, in direct conflict with

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[20] *E.g., United States v. Rindone*, 631 F.2d 491, 493 (7th Cir. 1980); *United States v. Phillips*, 577 F.2d 495, 501 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978); *United States v. Spagnolo*, 546 F.2d 1117, 1119 (4th Cir. 1976) (per curiam), *cert. denied*, 433 U.S. 909 (1977). Numerous other Courts of Appeals have referenced the *Staszcuk* formulation in passing on Hobbs Act jurisdiction issues, including the Third Circuit itself. *E.g., United States v. Cerilli*, 603 F.2d 415, 424 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980).

[21] It is undisputed that no evidence, of any nature, was introduced at trial by the government to show that the alleged conspiracy would have had *any* effect, actual or potential, on commerce if performed. PA-176.

Staszcuk, the Third Circuit wrongly substituted a wholly subjective test, which would rest federal jurisdiction upon hypothetical, imaginary or non-existent effects on commerce.

Under the rationale of *Feola,* jurisdiction must be predicated upon facts. In *Feola,* the jurisdictional nexus under 18 U.S.C. §111 is satisfied by the existence of a *fact,* the presence of a federal officer, just as jurisdiction under the Hobbs Act is based upon the existence of a fact—an effect on interstate commerce. If A and B conspire to assault X and X turns out to be a federal officer, the federal jurisdictional fact, and in turn federal jurisdiction, is present. However, if A and B conspire to assault X whom they *mistakenly* believe to be a federal officer, the federal jurisdictional fact is not present. Likewise, if a federal agent *tells* A and B that X, a federal officer, will be arriving to arrest them, and A and B conspire to assault X if he arrives, but X is a fiction created in the federal agent's imagination, just as was the hotel project in ABSCAM, there can be no federal jurisdiction.

Federal jurisdiction is not predicated solely upon the state of mind of the defendants. Fictions cannot replace jurisdictional facts. In this case, measured by the *facts,* no effect on commerce could ever take place. Here, the federal agents unilaterally fashioned a scheme which they hoped would satisfy jurisdictional requirements. In each case relied upon by the Third Circuit, however, the nature and extent of the conspiracy — the substance of the criminal design — was formulated by the defendants themselves.[22]

If the focus of the jurisdictional inquiry is upon the conspiratorial agreement, *see United States v. Feola, supra,* 420 U.S. at 695-96, it is both illogical and patently unfair to sanction governmental manipulation of that agreement solely to create federal jurisdiction. If the purpose of the *federal* conspiracy laws is to provide federal law enforcement officials with the tools necessary to combat criminal conduct in "areas of federal concern," it is likewise illogical to contend that these same officials may unilaterally create an "area of federal concern" in any given case so that they may prosecute it.

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[22] *See* cases cited in *Schwartz I,* 673 F.2d at 592-593, PA-74-77.

Whether one accepts Judge Aldisert's formulation that "[a] purely hypothetical effect, a fairy tale conjured by the FBI . . . is not 'a sufficient threat to [commerce] so as to give rise to federal jurisdiction,' " or one employs Judge Friendly's "manufactured jurisdiction" approach, *United States v. Archer, supra,* 486 F. 2d at 682, the reality is that no real, actual impact on commerce could have ever occurred in this case. This case, even more than *Archer,* epitomizes the concept of "manufactured federal jurisdiction."[23]

The Third Circuit completely misunderstood *Feola. See* 420 U. S. at 695-96.[24] As Judge Aldisert recognized:

> "The majority interweaves its jurisdicitonal argument with the argument that factual impossibility of completing a substantive offense does not bar a conviction of conspiracy. *They confuse proof of the crime of conspiracy with the jurisdictional power to*

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[23] In its opinion, the district court stated:

"Moreover, to permit this kind of artificial federalization *would effectively remove virtually all of the limitations upon the criminal jurisdiction of federal courts, and would be utterly contrary to accepted notions of federalism.*" 501 F.Supp. at 1204, PA-221 (emphasis added).

[24] In her opinion, Judge Sloviter remarked:

"In holding [in *Feola*] that there was a 'sufficient threat' to an 'area of federal concern' to meet the jurisdictional requirements as long as a federal officer was in fact the target of the planned attack, 420 U. S. at 695, *the Court did not preclude the existence of federal jurisdiction where the intended victim is believed to be a federal officer, but in fact is not.*" *Schwartz I,* 673 F.2d at 593, PA-78 (emphasis added). But *Feola* clearly requires that the victim of the agreement to assault *must* be a federal officer for federal jurisdiction to attach.

punish the crime. The presence of subject matter jurisdiction is a discete and primary issue in each case presented to a federal court, unlike a state court. The effect on commerce is both jurisdictional and substantive in a Hobbs Act prosecution, but the two inquiries are separate and distinct. *See, e.g., Feola,* 420 U. S. at 694-96." *Schwartz I,* 673 F.2d at 626 , PA-147 (emphasis added).

Not only are the two inquiries "separate and distinct," but also the standards by which they are determined differ. Respecting proof of the substantive offense, the subjective criminal intent of an alleged Hobbs Act defendant is crucial; respecting proof of Hobbs Act *jurisdiction,* however, the subjective criminal intent of a Hobbs Act defendant is irrelevant; it can neither create nor negate the jurisdictional fact. In *Staszcuk,* Judge Stevens understood this distinction and formulated a test which respected it. Judge Sloviter, in her opinion for the court below, adjured the limitations inherent in the commerce clause power, but established a test which shifts the focus of the jurisdictional inquiry away from the "existence of [real] facts" and to the subjective intent of the actor. As a result, the objective "realistic probability" test established by *Staszcuk* has been disembowled by the Third Circuit and the requirement in *Feola* that jurisdiction be predicated on fact has been eliminated.

It is petitioners' position that the Third Circuit, by its ruling, has abolished all jurisdictional limitations which heretofore existed under the Hobbs Act and has constructed a standard "which in practicality would extend federal jurisdiction over just about any robbery or extortion." *United States v. French,* 628 F. 2d 1069, 1077 (8th Cir.), *cert. denied,* 101 S. Ct. 364 (1980).

A Conviction for Extortion Under the Hobbs Act Absent Proof of a Demand or Request by a Defendant Should Not Be Permitted, and Clarification of This Issue Is Essential.

A plain reading of the definition of "extortion' in the Hobbs Act shows that proof of demand is necessary to convict. The district court held in part that the absence of proof of any express or implied demand or request for payment by petitioner required dismissal of the Hobbs Act charges. 501 F.Supp. at 1185, PA-178-179. The Third Circuit reversed, asserting that the law is clear throughout the circuits that proof of inducement by a public official acting "under color of official right" is unnecessary. *Schwartz I*, 673 F.2d at 594-595, PA-79-81. Petitioners submit that both the decision of the Court of Appeals and its rationale are incorrect.

The First, Third, and Eighth Circuits have each approved jury instructions which require a specific finding of inducement.[25] In fact, except for *Staszcuk*, where insufficient detail is provided to determine whether affirmative action was taken by the defendant, and *United States v. Hedman*, 630 F. 2d 1184 (7th Cir. 1980), *cert. denied*, 450 U. S. 965 (1981), which does nothing more than cite, as "settled law," the very cases which either include evidence of inducement or approve a charge on inducement, there is no decision under the Hobbs Act involving a public official which sustains an extortion conviction absent evidence of inducements, or of "initiative and purpose," *United States v. Hyde*, 448 F. 2d 815, 833 (5th Cir. 1971) (Wisdom, J.), *cert. denied*, 404 U. S. 1058 (1972) on the part of the official.[26]

In this case, it is clear that neither petitioner nor anyone acting on his behalf, at any time, requested or demanded money in connection with the proposed construction of the hotel in Philadelphia or in exchange for petitioner's use of his official position. Rather, the evidence is clear that petitioner was, at most, the passive recipient of money and would have supported the proposed project whether or not any money was paid to him.

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[25] *See United States v. Hathaway*, 534 F. 2d 386 (1st Cir.), *cert. denied*, 429 U. S. 819 (1976); *United States v. Addonizio*, 451 F. 2d 49, 59 (3d Cir.), *cert. denied*, 405 U. S. 936 (1972); *United States v. Adcock*, 558 F. 2d 397 (8th Cir.), *cert. denied*, 434 U. S. 921 (1977).

[26] "In other words, while the essence of bribery is voluntariness, the essence of extortion is duress." *United States v. Addonizio, supra*, 451 F. 2d at 72, *citing People v. Dioguardi*, 8 N. Y. 2d 260, 203 N. Y. S. 2d 870, 168 N. E. 2d 683 (1960).

In those cases decided under the Hobbs Act in which public officials were not defendants, the law has long been clear that, in the absence of proof that defendants induced or intended to induce payment, the mere acceptance of a bribe does not constitute extortion or violate the Hobbs Act. *E.g.*, *United States v. Gerald*, 624 F. 2d 1291 (5th Cir. 1980), *United States v. Duhon*, 565 F. 2d 345 (5th Cir.), *cert. denied*, 435 U. S. 952 (1978), *United States v. Hyde, supra.*[27] And, as noted above, given the requirement of inducement even in official corruption cases and the fact that no case involving official corruption has ever resulted in conviction of the defendant absent proof of a request or demand, the Third Circuit's reading of the Hobbs Act statute and the conclusion which it reached are clearly incorrect. Clarifiction of this troublesome issue is plainly warranted.

CONCLUSION

For these reasons, this Court should issue a writ of certiorari to the Court of Appeals for the Third Circuit and review and correct the decision below.

Respectfully submitted,

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May, 1984

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[27] Indeed, no rational argument can be made to support divergent approaches to the Hobbs Act. As the Fifth Circuit stated: "[t]he distinction from bribery is therefore the initiative and purpose on the part of the [defendant] and the fear and lack of voluntariness on the part of the victim." *United States v. Hyde*, 448 F.2d 815, 833 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972).

83-1891 (2)

Nos. 83-1892 (2)

Supreme Court, U.S.
FILED
MAY 18 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

HARRY P. JANNOTTI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

GEORGE X. SCHWARTZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

APPENDIX OF PETITIONERS JANNOTTI AND SCHWARTZ

On Petitions for Writ of Certiorari

In No. ____________ and No. ____________ Respectively

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-1093
No. 83-1094

UNITED STATES OF AMERICA

vs.

JANNOTTI, HARRY P.
SCHWARTZ, GEORGE X.

Harry P. Jannotti,
appellant in No. 83-1093
George X. Schwartz,
appellant in No. 83-1094

(D.C. Crim. No. 80-00166-02)
(D.C. Crim. No. 80-00166-04)

Argued: September 12, 1983
Before: SEITZ, *Chief Judge;* Gibbons
and Rosenn, *Circuit Judges.*

(Opinion Filed: February, 21, 1984)

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OPINION OF THE COURT

SEITZ, *Chief Judge:*

Harry P. Jannotti and George X. Schwartz appeal sentences imposed after their convictions for conspiring to violate the Hobbs Act, 18 U.S.C. § 1951(a) (1976), and, in the case of defendant Schwartz, the Racketeer Influenced and Corrupt Organization Act ("RICO Act"), 18 U.S.C. § 1962(d) (1976). This court has jurisdiction under 28 U.S.C. § 1291.

I. *PROCEDURAL HISTORY*

Defendants are former members of the Philadelphia City Council. They were tried together on charges of conspiring to interfere with interstate commerce, in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and conspiring to conduct an enterprise through racketeering activities, in violation of the RICO Act, 18 U.S.C. 1962(d). The indictment charged that the conspiracies existed for approximately three weeks, from about January 11, 1980, to about February 2, 1980. The jury found that Schwartz was guilty on both counts, and that Jannotti was guilty on the Hobbs Act count and innocent on the RICO count.

The district court, however, granted defendants' motions to set aside the guilty verdicts in their entirety, dismissed the Hobbs Act counts for lack of jurisdiction, and entered judgments of acquittal. 501 F. Supp. 1182. The government appealed these orders and judgments, and this court, sitting in banc, reversed and ordered reinstatement of the jury's verdicts. 673 F.2d 578, *cert. denied*, 457 U.S. 1106 (1982). The district court reinstated the verdicts and imposed sentences.

II. *FACTUAL BACKGROUND*

A brief statement of the facts of this case will assist in understanding the issues presented in this appeal. A more complete statement of the facts is found in this court's in banc decision. *See* 673 F.2d 578, *cert. denied*, 457 U.S. 1106 (1982). Schwartz's and Jannotti's indictments resulted from the FBI's so-called "ABSCAM" investigation of political corruption. The central device in this "sting" investigation was the creation of an elaborate scheme in which FBI undercover agents pretended to represent the interests of a fictitious Arab sheik seeking to immigrate to this country and to construct a large hotel in Philadelphia.

Undercover FBI agents, posing as representatives of the sheik, came to Philadelphia in January 1980 to seek out city officials who would promise political favors in exchange for cash. Specifically, the agents sought help from some members of the Philadelphia City Council on such matters as zoning and building permits. The agents had previously met with Howard

Criden, a Philadelphia lawyer, and through Criden they met in January with Schwartz, Jannotti, and Louis Johanson, all members of the City Council.[1] At these meetings the defendants and Johanson accepted cash payments and made promises of political assistance to the sheik on matters before the city council. All of these meetings took place at the Barclay Hotel in Philadelphia, where the agents had set up audio and video tape equipment to record the conversations surreptitiously. Telephone conversations were also recorded. These audio and video tapes played a crucial role in the prosecutions of Schwartz and Jannotti.

III. *JURISDICTION UNDER THE HOBBS ACT*

Defendants raise numerous objections to their convictions. They first argue that this court, in its earlier decision in banc, announced the standard for jurisdiction under the Hobbs Act but ignored a secondary contention, that the evidence failed to meet that standard. Defendants therefore renew in this appeal their argument that the evidence was insufficient. We disagree that the issue of the sufficiency of the evidence was not considered in the earlier opinion. After a thorough examination of the record, this court held as follows:

> In this case the jury found that the defendants conspired to violate the Hobbs Act by their acceptance of payments in return for their promises to expedite completion of an elaborate hotel project which, had it been constructed,

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[1] Criden and Johanson were convicted in the Eastern District of New York on charges of conspiracy and bribery. Their convictions were upheld on appeal. *United States v. Myers*, 692 F.d 823 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 2437, 2438 (1983).

> would have entailed at least a $30 million expenditure. Had the project actually been planned as represented, defendants' actions would have violated the Hobbs Act even if unforeseen difficulties, such as the overthrow of the "sheik", prevented any further action on the project. The federal interest in protecting interstate commerce is no less under the factual situation presented in this case. The threat posed by defendants' actions is just as great. Since Congress has exercised the full scope of its commerce power in the Hobbs Act, we conclude that there was Hobbs Act jurisdiction.

673 F.2d at 594. It is clear from this passage that the court in its earlier opinion not only articulated a standard for jurisdiction under the Hobbs Act but also held that jurisdiction existed on the basis of evidence presented by the government.

IV. *HEARSAY EVIDENCE*

Both defendants argue that the district court improperly admitted various pieces of important hearsay evidence. Unless otherwise noted, defendants entered timely objections to the admission of this evidence at trial.

All of the evidence at issue was admitted under the "coconspirator exception" to the rule against hearsay, Fed. R. Evid. 801(d)(2)(E). Under that exception, the out-of-court statements of the defendants' coconspirators will not be excluded as hearsay. The rule is a source of considerable confusion, but its requirements, as construed in this circuit, may be summarized as follows. There must be "independent evidence" of the conspiracy, *i.e.*, evidence independent of the proffered hearsay itself. This evidence must establish by a "clear preponderance" that the conspiracy existed and that both the defendants and the declarant were members of the conspiracy. The "preponderance" test "simply requires the prosecution to present sufficient proof leading the trial judge to find 'that the existence of the contested fact is more probable than its nonexistence.'" *United States v. Ammar*, 714 F.2d 238, 250 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983). Finally, the out-of-court statement must have been made during the course of, and in furtherance of, the conspiracy. *Id.* at 245. Where the district court has admitted such statements under Rule 801(d)(2)(E), our review is limited to the question whether, viewing the evidence in a light most favorable to the proponent (in this case the government), the district court had "reasonable grounds" to support its ruling. *Id.* at 249.

A. *Proof of the Schwartz-Jannotti Conspiracy*

In order to assess the defendants' objections to the admission of certain out-of-court statements, it is necessary to review first their challenge to the district court's finding that there was a preponderance of independent evidence establishing a conspiracy to which the defendants belonged. If we conclude that the district court had reasonable grounds for its finding, we must then inquire whether the out-of-court statements challenged by the defendants satisfied the other requirements of Rule 801(d)(2)(E).

We have no doubt whatsoever that the district court had reasonable grounds for finding that a preponderance of the independent evidence established a conspiracy in which Schwartz, Jannotti, and Criden were members. The goal of this conspiracy was illegally to assist the fictitious sheik in matters before the Philadelphia City Council relating to the hotel project, in exchange for cash. In the videotape of a meeting between Schwartz, Criden, and the undercover agents on January 23, 1980, Schwartz told the agents that "we got uh five or six now [new?] members [of the City Council] that came in. Uh, you tell me your birth date. I'll give them to you for your birthday. (Laughter)." (App. 696a) This statement was independently admissible as an admission under Rule 801(d)(2)(A). Schwartz also made statements that evidenced Criden's complicity in the conspiracy. For example, Schwartz told the agents that "[t]here are certain protocol that should be worked out in advance and that's where the law firm, Howard [Criden], will become involved. To put it together so that it doesn't boomerang." (App. 756a) At the conclusion of the meeting, Schwartz examined and accepted an envelope containing $30,000 in cash.

In the videotape of the meeting between Criden, Jannotti, and the agents, also admissible under Rule 801(d)(2)(A), Jannotti stated the following:

JANNOTTI:	We'll go in there [the City Council] and battle, we'll go in and battle.
AGENT:	You're with us?
JANNOTTI:	Certainly, we'll go in and battle.

(App. 867a) Jannotti also explained to the agents that Schwartz had told him about the proposed scheme:

AGENT:	Okay, ah, are you aware of my position and ah, ah.
JANNOTTI:	George [Schwartz] has told me.

(App. 848a) At the conclusion of this meeting, the agents gave Jannotti an envelope containing $10,000 in cash.

Because we are convinced that the district court had reasonable grounds for finding that a conspiracy was established by a preponderance of the evidence, we must now consider the defendants' challenges to the admission of particular out-of-court statements under the coconspirator rule.

B. *The Telephone Calls*

The defendants first challenge the admission of audio tapes of three phone conversations on January 11 and January 18, 1980, between Howard Criden and an undercover FBI informant. Defendants argue that the conspiracy discussed above had not yet begun at the time of these conversations, and that the tapes therefore should not have been admitted under Rule 801(d)(2)(E). The indictment charged both defendants with belonging to a conspiracy starting January 11, the date of the earliest of the conversations at issue. The government, however, does not challenge in its brief the defendants' assertion that no conspiracy existed at the time of these conversations. Instead, the government seems to argue that the tapes were admissible because they were merely "background" and nonprejudicial. The government, however, has cited no authority for a "background" exception to the hearsay rule, and we will therefore assume that these tapes should have been excluded from evidence at trial.

We reject defendants' contention, however, that admission of the evidence constitutes reversible error. Neither Schwartz nor Jannotti is mentioned in the conversations. The January 18 conversations simply concern the arrangements for the meeting between Criden and the undercover agents and do not hint at illegality. We agree that certain remarks during the January 11 conversation suggest a general atmosphere of corruption. Criden refers to a law partner who is a city councilman, suggesting a deal in the making that might involve political favors. This reference, however, is harmless in view of admissible evidence, considered later, that the partner, Johanson, was indeed a member of the defendants' conspiracy. There are also remarks in the conversation about arrangements being made with Philadelphia-area congressmen who were later indicted and convicted for involvement in ABSCAM. The possibility that the defendants were prejudiced by this indirect association with the congressmen is insignificant in view of other proof of the defendants' guilt, including the statements of Schwartz and Jannotti quoted above. We therefore conclude that it is "highly probable" that these tapes "did not contribute to the jury's judgment of conviction." *Government of Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976).[2]

Defendants also challenge the admission of these particular tapes on the ground that the admission violated their rights under the sixth amendment to confront witnesses. This issue is raised for the first time on appeal, no objection having been entered in the district court. We will assume without deciding that questions of alleged constitutional error under the sixth amendment are generally cognizable under the doctrine of "plain error", Fed. R. Crim. P. 52(b), and that the admission of this hearsay evidence failed to satisfy the requirements of the confrontation clause. We conclude, however, that the admission of these tapes, if erroneous, was harmless beyond a reasonable doubt. *Brown v. United States*, 411 U.S. 223 (1973); *Chapman v. California*, 386 U.S. 18, 24 (1967).

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[2] The "high probability" standard is different from the "reasonable doubt" or "reasonable possibility" standard of appellate review used to determine the harmlessness of constitutional error. *See Chapman v. California*, 386 U.S. 18, 24 (1967). "High probability" requires that we have a sure conviction that the error did not prejudice the defendants. *Cf. Kotteakos v. United States*, 328 U.S. 750, 764-65, 776 (1946). We may not simply conclude that it is more likely than not that the error was harmless. On the other hand, we may be firmly convinced that the error was harmless without disproving every "reasonable possibility" of prejudice. *See* R. Traynor, *The Riddle of Harmless Error* 33-37, 44-45 (1970).

C. *The Meetings on January 18, 1980*

The defendants next challenge the admissibility of videotapes of meetings between Criden and the FBI undercover agents, and between Criden, the agents, and Louis Johanson, a partner in Criden's law firm and a member of the Philadelphia City Council. Defendants challenge this evidence on various grounds. The first meeting, they assert, took place before the conspiracy began. As explained above, we are willing to assume that this is true and that the evidence should have been excluded at trial. We believe, however, that this evidence was merely cumulative. At the meeting, the agents explained the fictitious hotel project in greater detail to Criden. The agents told Criden they needed help with the many problems that would arise during such a project, and the discussion turned to Johanson and Schwartz. Criden agreed to help enlist them, and the agents promised him $10,000 in return. In view of the very persuasive and damning evidence noted elsewhere in this opinion, it is highly probable that the supposedly erroneous admission of this evidence did not influence the jury in any substantial way, despite the fact that defendant Schwartz was mentioned by name on the tape as a potential coconspirator.

Defendants challenge the admission of the tape of the second meeting, between the agents, Criden, and

Johanson, on the grounds that there was no independent evidence establishing that Johanson had joined the conspiracy between Schwartz, Jannotti, and Criden. In addition, they argue that even if there were such independent evidence, the tape of the January 18 meeting was inadmissible because the meeting occurred before Schwartz and Jannotti joined the conspiracy, and because, by the time they did join, Johanson had withdrawn. The defendants challenge the admission of the tape of the third meeting, after Johanson had left, on the ground that Criden's remarks to the undercover agents were not in furtherance of any conspiracy, even the one between Criden and Johanson.

We first consider whether Johanson was a member of the Schwartz-Jannotti conspiracy described above. The independent evidence of Johanson's involvement is not as strong as the evidence against Schwartz, Jannotti, and Criden, but we nonetheless conclude, without hesitation, that the district court had reasonable grounds for holding that the evidence satisfied the preponderance requirement.

There was independent evidence that undercover FBI agents established a scheme to solicit political help from Philadelphia City Council members on matters affecting a hotel project (App. 552a), and that Schwartz and Jannotti agreed to sell political favors to these agents. There was also independent evidence that Johanson was a council member serving on the council committee dealing with zoning matters (App. 177a), that Johanson met with these same agents and Criden less than a week before the agents' meetings with Schwartz and Jannotti, described above, and that Johanson accepted $25,000 in cash from them (App. 471a). Finally, independent evidence established that Criden was paid $5,000 for "producing" Johanson (App. 524a, 572a, 577a), and that Criden was depositing the money he was receiving from the agents in a safe deposit box which was accessible only to Criden, Johanson, and another member of their law firm (App. 596a-97a). We have no doubt that the district court had reasonable grounds for including Johanson in the conspiracy on the basis of this evidence.

The question remains whether Johanson's particular statements at the meeting on January 18 were admissible. Defendants argue that even if Johanson were a member of the conspiracy, this particular meeting took place before Schwartz and Jannotti joined. Moreover, Johanson had withdrawn from the conspiracy by the time they became members. The fact that the Johanson meeting occurred before Schwartz and Jannotti joined the conspiracy is without legal significance. The Supreme Court has held that "the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy." *United States v. United States Gypsum Co.*, 333 U.S. 364, 393 (1948). *See also United States v. Lester*, 282 F.2d 750, 753 (3d Cir. 1960); *Lefco v. United States*, 74 F.2d 66, 68 (3d Cir. 1934).

We find the defendants' withdrawal argument unsupported by the evidence. The record indicates that Johanson refused to help Criden enlist Schwartz (App. 607a), and it also suggests that Johanson was unaware that Criden was able to contact Schwartz despite this refusal. There is no evidence at all, however, that Johanson had withdrawn from the conspiracy. Indeed, he had accepted $25,000 from the undercover agents only a few days before his decision not to enlist Schwartz, and there is no reason to believe he did not still intend to provide political favors as promised. As this court has explained, "[t]he defendant must present evidence of some affirmative act of withdrawal on his part, typically either a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals." *United States v. Steele*, 685 F.2d 793, 803 (3d Cir.), *cert. denied*, 103 S. Ct. 213 (1982). Once the defendant has made a prima facie showing of withdrawal, the burden shifts to the government either to impeach the defendant's proof or to show some act by the defendant in furtherance of the conspiracy and subsequent to the alleged withdrawal. *Id.* The defendants have not made a prima facie showing of withdrawal. The mere possibility that Johanson may not have known that Criden enlisted Schwartz on his own does not require us to conclude that Johanson had withdrawn or had somehow become a member of a different conspiracy, since "[i]t is well-established that one conspirator need not ... be aware of all the details of the conspiracy in order to be found to have agreed to participate in it." *United States v. Riccobene*, 709 F.2d 214, 225 (3d Cir.), *cert. denied*, 104 S. Ct. 157 (1983).

We also reject defendants' assertion that Criden's statements to the agents at the meeting immediately after Johanson's departure were not in furtherance of the conspiracy. At that meeting, Criden met alone with the undercover agents, discussed the enlistment of Schwartz and Jannotti, and received $5,000 for enlisting Johanson. (App. 499a-500a) It is difficult to imagine statements more in furtherance of a conspiracy to sell political favors.

Finally, the defendants challenge the admission of videotapes of two meetings between Criden and the undercover agents. The first of these meetings occurred on January 23, 1980, immediately after the meeting between Criden, the agents, and Schwartz. The second occurred on January 24, 1980, immediately after the meeting between Criden, the agents, and Jannotti.

The defendants challenge the admission of these videotapes on the ground that the statements at the meetings were not in furtherance of the conspiracy to buy influence among members of the city council. The improper admission of these videotapes, they argue, was prejudicial and constitutes reversible error.

We find that, with the exceptions discussed below, the statements at the two meetings between Criden and the undercover agents were in furtherance of the conspiracy to buy influence. At the first meeting, Criden collected $5,000 for introducing Schwartz to the agents. Criden assured the agents that Schwartz was corrupt and would fulfill his end of the illegal bargain. (App. 760a) The conversation then turned to the proposed meeting with Jannotti. The agents asked Criden whether the meeting had been arranged, and Criden responded that he had had some difficulties (App. 762a-64a) and was not sure Jannotti could or should be included (App. 771a). Eventually Criden agreed to try to arrange the meeting, and there was a discussion of the price required to purchase Jannotti's assistance. Criden and the agents decided to begin with an offer of $10,000.

At the second meeting, the agents asked Criden whether Jannotti understood the arrangement and could be relied on to perform. Criden responded that Jannotti understood the offer and was reliable. (App. 895a, 897a, 905a)

In each of these two meetings, the agents and Criden discussed the probable success of the scheme and the amounts required to buy the influence of the coconspirators. Although not as central to the conspiracy as the agents' meetings with Jannotti, Schwartz, and Johanson, these meetings nonetheless clearly and materially advanced the conspiracy toward its goal of using illegally acquired political influence to eliminate obstacles to the construction of the hotel. We therefore hold that these portions of the videotapes were properly admitted under Rule 801(d)(2)(E).

We agree with defendants, however, that certain portions of these videotapes in which the parties discussed certain United States Congressmen were inadmissible because the discussions were not in furtherance of the conspiracies charged. Defendants challenge the admission of tapes of both the January 23 and the January 24 meetings on this ground. The government responds that the defendants at trial withdrew their objection to the January 23 meeting. (App. 195a-96a, 792a-94a, 798a) Although the trial transcript is not very clear, we believe that the withdrawn objection was a relevancy objection entered after the jury had viewed the videotape, not the Rule 801(d)(2)(E) objection entered prior to the viewing. (App. 684a) We will therefore review both the January 23 and the January 24 meetings.

In the meeting on the 23rd, the agents and Criden discussed two Pennsylvania congressmen and referred to deals with them that were apparently different from the hotel project. (App. 766a-67a, 774-77a, 781a-82a) In the meeting on the 24th, the agents and Criden discussed an upcoming meeting with a member of Congress from the Philadelphia area. Later during the meeting, the congressman called and talked to one of the agents. (App. 894a, 906a-07a)

The presence of these discussions on the tapes is not surprising, of course, since ABSCAM was a large and diverse undertaking, with many overlapping instances of graft and corruption. The government, however, has not argued before this court that these other schemes were part of the conspiracy with which we are concerned, and apparently the government made no such argument at trial. This court is aware that in some instances it may be very difficult to delete inadmissible portions of a videotape without rendering the evidence unintelligible. Such is not the case here, however. We have no doubt that the objectionable portions of these videotapes could have been deleted without seriously affecting the impact of the tapes as a whole, and we therefore conclude that these portions of the tapes should not have been admitted.

Despite this conclusion, however, we find such error was not prejudicial to the defendants in any significant way. Any blemishes to the defendants' characters resulting from the admission of this evidence were utterly insignificant in view of the admissible evidence against the defendants.

E. *Conclusion*

We conclude that, with the exception of the statement made about the congressman, discussed above, and the earlier tapes of Criden's meetings with the agents, which we assume to be inadmissible but harmless, all of the hearsay evidence offered by the government under Rule 801(d)(2)(E) was properly admitted.

V. *THE ENTRAPMENT CHARGE*

Defendants next argue that the district court improperly charged the jury on the issue of entrapment by bifurcating the burden of proof and requiring the defendants to satisfy a threshold burden before they could be entitled to jury consideration of the defense. Our review of this issue is plenary.

The district court's charge to the jury on the issue of entrapment was a long one, and what follows are only the passages most relevant to the defendants' argument.

> Before an issue of entrapment arises and before you have to consider entrapment the evidence must lead you to believe that the Government induced the defendant to commit the crime charged.... The issue really is: Is this a crime which would have been committed without the Government's participation or is this something where the idea for committing this particular crime originated with the Government and that it was the Government's idea that this particular crime be committed? (App. 1351a)
>
> If the government is responsible for inducement -- that is, if the idea for committing the crime originated with the Government, if this specific crime would not have been committed but for the Government's idea and action -- then in order to obtain a conviction the Government must go further and must prove beyond a reasonable doubt that the defendant was predisposed to commit crimes of that type. (App. 1352a)
>
> If there was inducement, then the Government cannot obtain a verdict of guilty unless the evidence as a whole proves beyond a reasonable doubt that the particular defendant was predisposed to commit that type of offense. (App. 1362a)
>
> [Y]ou are, first of all, on the one had, not here to decide generally whether you like what the Government did or not but, rather, the specific question as to whether what they did amounted to inducement and, if so, whether they have shown predisposition. (App. 1366a)

After the charge had been given, a side-bar conference was held to consider objections. Defendants' lawyers argued that the court had instructed the jury on a bifurcated burden of proof on the issue of entrapment, which was improper in view of certain prior decisions in this circuit. The court apparently rejected this argument but agreed for other reasons to supplement the charge on entrapment. In this supplemental charge, the court stated the following:

> If you find from the evidence that there was inducement, that the crime was induced by the Government agents -- that is, if you accept as correct the inferences urged upon you by defense counsel to the effect that Criden was being paid money to bring them in and that they were being offered this hotel project only on condition that they accept and so forth, if there was inducement -- if you find those facts to be correct, then that would amount to inducement and you would therefore acquit the defendants unless the evidence as a whole satisfies you beyond a reasonable doubt that they were predisposed.
>
> In short, the burden is upon the Government in a case of this kind to prove beyond a reasonable doubt that there was no entrapment. If the defendants were induced to commit the crime, then they were entrapped and should be acquitted unless the Government satisfies you beyond a reasonable doubt that they were predisposed to commit the crime. (App. 1378a-79a)

To analyze the defendants' objection to this charge, we turn to an earlier decision of this court, *United States v. Watson*, 489 F.2d 504 (3d Cir. 1973), where we considered how to charge a jury on entrapment. To be entitled to such a charge, the defendant must first show "(1) evidence that the Government initiated the crime, regardless of the amount of pressure applied to the defendant, and (2) any evidence negating the defendant's propensity to commit the crime." *Id.* at

509. The question of whether the defendant is entitled to the entrapment charge is for the court. *Id.* at 511. *See also United States v. Wolffs*, 594 F.2d 77, 81 (5th Cir. 1979). If the court decides to give the charge, it must follow the "unitary" approach, in which the burden to disprove the entrapment defense as a whole, beyond a reasonable doubt, is placed exclusively on the government. Failure to place this burden exclusively on the government will not be cured by the presence of a general charge that the government has the burden of proving the defendant's guilt beyond a reasonable doubt. *Watson*, 489 F.2d at 51 n.10; *Government of Virgin Islands v. Cruz*, 478 F.2d 712, 717 (3d Cir. 1973) (dictum).

The focus of the entrapment defense is on the defendant's predisposition, as required by the Supreme Court in *United States v. Russell*, 411 U.S. 423 (1973). Inducement, however, is not irrelevant. As this court explained in *Watson*,

> the stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the inducement rather than to the defendant's own predisposition. Under the unitary approach we require, inducement therefore enters as an element of predisposition which the Government must disprove, rather than as an independent element which the defendant must prove.

489 F.2d at 511.

This approach is to be distinguished from the "bifurcated" approach, in which the burden of proof is divided between the defendant and the government. Under the bifurcated approach, the jury must first consider whether the defendant has met his burden on the issue of inducement. If so, then the jury must consider whether the government has proved predisposition. *See United States v. Sherman*, 200 F.2d 880, 882-83 (2d Cir. 1952). This court rejected the bifurcated approach in *Watson*, 489 F.2d at 510, 511.

Our preference for the unitary approach is grounded in several concerns. First, the Supreme Court has clearly held that entrapment is, at bottom, a question of the defendant's predisposition and not the government's inducement, although the latter is a relevant consideration. *Russell, supra*, 411 U.S. at 433-36. To divide the burden of proof between the defendant and prosecution on the issues of inducement and predisposition encourages the jury to ignore the Supreme Court's holding. Second, the unitary approach avoids the possibility of jury confusion inherent in a shifting burden of proof. Finally, the unitary approach is more consistent with the government's ultimate burden of proving the defendant's guilt beyond a reasonable doubt. Under our approach, the defendant need not offer evidence sufficient to support a *finding* of inducement, as the bifurcated approach would seem to require. Instead, the defendant need only raise a reasonable *doubt* about predisposition. *Notaro v. United States*, 363 F.2d 169, 176 (9th Cir. 1966).

Turning to the district court's charge in the present case, we note that the court clearly stated that "the burden is upon the Government in a case of this kind to prove beyond a reasonable doubt that there was no entrapment." (App. 1379a) Repeatedly, however, the court indicated that the defendants had a threshold burden of showing inducement. Not only did this incorrectly divide the burden between the defendants and the government, but it also required an independent consideration of the issue of inducement, apart from the central issue of predisposition. We must therefore conclude that the district court's instruction on entrapment was erroneous.

We are not confronted here with an error affecting the defendants' constitutional rights. The entrapment defense "is not of a constitutional dimension," *United States v. Russell*, 411 U.S. 423, 433 (1973), and the erroneous instruction affected no other possible constitutional right. We are therefore not required in this appeal to find beyond a reasonable doubt that the error was harmless. *Chapman v. California*, 386 U.S. 18 (1967). Instead, we must use the "highly probable" standard of appellate review discussed above. *Government of Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976). Applying this standard to the circumstances of this case, we hold that the erroneous instruction is not reversible. Fed. R. Crim. P. 52(a). As noted above, the district court charged the jury that it was obligated to acquit the defendants if the government failed to disprove entrapment beyond a reasonable doubt. This part of the charge was correct. The charge was erroneous insofar as the district court improperly required the defendants to show some evidence of inducement, either by introducing their own proof or by reference to the government's evidence. This evidence, however, was patent: the government had created an elaborate fiction to convince the defendants that an Arab sheik was prepared to pay bribes to local officials in exchange for favors.

The district court correctly placed on the government the burden of proving predisposition beyond a reasonable doubt. We find that the government's evidence established overwhelmingly that the defendants enthusiastically accepted bribes. There simply is no credible evidence that the defendants were reluctant to take the money. To the contrary, the evidence shows the defendants, each of them an elected public official, boasting of their power and their corruption. In view of this overwhelming proof, we conclude without hesitation that the defendants were not prejudiced by the district court's error.

Defendants also argue that the district court's instruction on entrapment was so confusing as to warrant reversal. We agree that the charge was interspersed with digressions on legal and factual issues unrelated to the question of entrapment. We conclude, however, that the district court's instruction was not prejudicially confusing.

VI. *ENTRAPMENT AND AGENCY*

Related to the defendants' challenge to the entrapment instructions is the argument that they were entitled, as a matter of law, to an instruction that Criden should be considered a government agent in determining whether there was entrapment. This argument, even if meritorious, is unavailing, since there is no evidence that Criden attempted to induce the defendants beyond informing them of the availability of the sheik's offer. The defendants did not call Criden as a witness, nor did they seek to establish in any other way that Criden was instrumental in persuading the defendants to accept the bribes. We will not guess about such matters. Moreover, we note that the district court instructed the jury on the defendants' claim that Criden was an agent, and we can only assume that the jury gave the theory whatever weight it was due. We will give it no more.

VII. *THE RICO CHARGE*

Finally, defendant Schwartz attacks his conviction under the RICO Act. Schwartz was convicted under

RICO section 1962(d), 18 U.S.C. § 1962(d), for conspiring to violate section 1962(c). Section 1962(c) states that no person "associated with" an enterprise affecting interstate commerce may "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity ...." The "enterprise" in the present case was the law firm of Criden, Johanson, Dolan, Morissey & Cook, in which both Criden and Johanson were partners. Schwartz raises two issues: first, that his conviction was not supported by evidence of a conspiracy to conduct an enterprise through a pattern of racketeering, and second, assuming such a conspiracy did exist, that there was insufficient evidence of Schwartz's membership in it. We will consider these two contentions together. We examine the evidence in a light most favorable to the government to determine whether a jury could have resolved these issues against Schwartz beyond a reasonable doubt.

We begin by noting the obvious. There is no question that a conspiracy existed to sell political favors to a fictitious Arab sheik, and that Schwartz was a member of that conspiracy. The evidence discussed above amply supports these conclusions. The question now under consideration is whether there was a *RICO* conspiracy, and whether Schwartz knowingly joined that RICO conspiracy.

The Fifth Circuit has stated, and we agree, that "[t]he mere fact that a defendant works for a legitimate enterprise and commits racketeering acts while on the business premises does not establish that the affairs of the enterprise have been conducted 'through' a pattern of racketeering activity." *United States v. Cauble*, 706 F.2d 1322, 1332 (5th Cir. 1983). Instead, the government must show that a person "'is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise; or ... the predicate offenses are related to the activities of that enterprise.'" *United States v. Provenzano*, 688 F.2d 194, 200 (3d Cir.), *cert. denied*, 103 S.Ct. 492 (1982) (quoting *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981)). In order to establish a conspiracy to violate section 1962(c), "the government must prove beyond a reasonable doubt that ... the individuals knowingly agreed to participate in the 'enterprise' through a pattern of racketeering." *United States v. Riccobene*, 709 F.2d 214, 220-21 (3d Cir.), *cert. denied*, 104 S. Ct. 157 (1983).

With these principles in mind, we turn to the record. Evidence presented to the jury would have allowed it to conclude beyond a reasonable doubt (1) that the ABSCAM "front" involved a fictitious Arab sheik who wished to contact a politically influential Philadelphia law firm as part of an effort to build the hotel; (2) that Schwartz knew this; and (3) that Schwartz agreed not only to perform political favors but also to set up contacts with the Philadelphia firm of Blank, Rome, Comisky & McCauley.[3] The jury could also reasonably have concluded that Criden regarded the illegal deal he had struck with the sheik as a business matter for his own firm of Criden, Johanson, Dolan, Morissey & Cook, and that Criden regarded the sheik and the undercover agents as the firm's "clients".[4] Finally, the evidence would have allowed the jury reasonably to conclude that although the Blank, Rome firm was expected to get most of the sheik's business, Criden expected his firm to continue to benefit, and that Schwartz knew this.[5]

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[3] At the meeting on January 23, 1980, between Schwartz, Criden, and the undercover agents, one of the agents asked if Schwartz knew of a "local, politically savvy" law firm that the sheik could use. (App. 725a) Criden responded that Schwartz's old law firm, Blank, Rome, was the best candidate because of its expertise in building and zoning matters. (App. 726a-27a) Criden explained that he and Schwartz had "already discussed" the matter of the law firm. (726a-27a, 752a) Finally, Schwartz explained that Criden would work with the firm to take care of "certain protocol that should be worked out in advance ...." (App. 755a-56a) This was to insure that the deal did not "boomerang." (App. 756a)

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[4] At the same meeting described in the preceding footnote, Schwartz told the agent that Criden could "help" in the search for a firm. The agent responded that it might be difficult to use Criden's firm because one of the partners (Johanson) was a member of the City Council, and it might create the appearance of a conflict of interest. The agent emphasized, however that he did not want to cut Criden out of the action. Criden reassured the agent that he and Schwartz had discussed these matters, and that there was no reason to worry. (App. 725a-26a)

Ellis Cook, one of Criden's law partners, testified at the trial that on January 21, 1980, Criden gave him two sums of money, $3,000 and $5,000, both in cash. Criden described the first payment to Cook as his "fee" for the meeting between Criden, Johanson, and the undercover agents three days earlier. Criden told Cook that the second amount was part of Johanson's payment, and that Cook was to put it in a safe deposit box accessible only to Criden, Johanson, and Cook. (App. 596a-97a) Cook had leased the safety deposit box, on Criden's instructions, long before this meeting. As Cook explained, "it was to hold certain valuable papers for clients." (App. 620a) At Criden's request, Cook later withdrew this money in the form of bank money orders. The money orders were payable to the Criden, Johanson law firm. (App. 598a-600a) When asked why Criden was giving money to him, Cook explained that Criden "had always been good to me, plus I had to do the legal work that was coming out of this." (App. 624a. *See also* App. 626a-27a, 640a, 643a.)

[5] Ellis Cook testified that Criden told him the hotel project would be handled by the Blank, Rome law firm, but that "[t]hey would be working with us on the project." (App.

In view of this evidence, we conclude that a jury could have decided, beyond a reasonable doubt, that legal work was an important part of the proposed transaction, that Criden's firm was expecting to do some of this legal work, and that Schwartz knew this. The jury could therefore have concluded beyond a reasonable doubt that Criden and Schwartz knowingly agreed to conduct or participate, directly or indirectly, in the conduct of the law firm's affairs through a pattern of racketeering activity, as proscribed by the RICO Act.

VIII. *CONCLUSION*

For the above stated reasons, the sentences of defendant Schwartz under the Hobbs Act and the RICO Act, and the conviction of defendant Jannotti under the Hobbs Act, will be affirmed.[6]

606a-07a) Criden indicated that he might be talking to someone about the possibility that Cook, Criden, and another partner would join the Blank, Rome firm. (App. 607a) This would bring to four the number of partners at the firm who had profited or could expect to profit from the hotel project and the legal business it would generate. Three of these were "name" partners. At the meeting on January 23, 1980, between Criden and the undercover agents after Schwartz had left the room, Criden explained the legal arrangements. He stated that there would be "substantial legal fees involved" and that these fees would be shared:

> For obvious reasons, okay, there will be substantial legal fees involved. Now I made a deal with him today. Okay, which was one of the reasons that everything worked so smooth because what was given to him was minor in comparison to what will be made in legitimate legal fees in a project of this nature. (App. 759a)

[6] Defendants also raised certain issues in order to preserve them for future appeal. These issues, according to the defendants' briefs, are the following: the nature of the proof necessary to show

ROSENN, *Concurring and Dissenting.*

I concur and join in the majority opinion except insofar as it sustains the RICO conviction. I respectfully dissent from part VII (the RICO charge) and part VIII because the Government has not proved that Schwartz committed the offense charged in the RICO indictment.

I.

As the majority opinion notes, both appellants, members of the Philadelphia City Council, were convicted of having conspired to obstruct interstate commerce in violation of the Hobbs Act by accepting payments in return for promises to expedite the construction of a major hotel complex in the city. The construction plan, however, was only part of a "sting" operation. On the same operative facts, the jury also found the defendant Schwartz guilty of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d) (1976).

The RICO indictment (count two) charged Schwartz and Jannotti, together with Criden, Johanson, and an unindicted coconspirator, Ellis Cook, with conspiracy to conduct and participate in the conduct of the affairs of a law firm, Criden, Johanson, Dolan, Morrissey & Cook (the firm), through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d) (1976). The first paragraph of the indictment defined the firm as a business and legal entity engaged in the practice of law in Philadelphia,

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the requisite jurisdictional effect on interstate commerce under the Hobbs Act; the sufficiency of the government's proof of extortion under the Hobbs Act; whether the defendants were entrapped as a matter of law; and whether the government violated the defendants' due process rights during the course of its ABSCAM investigation. These issues were decided by this court in its previous in banc decision, 673 F.2d 578, *cert. denied*, 457 U.S. 1106 (1982).

Pennsylvania, and as constituting an "enterprise engaged in, and the activities of which affected, interstate commerce." Criden and Johanson were partners in that firm; Schwartz and Jannotti were not.

The object of a RICO conspiracy is to violate a substantive provision of the RICO statute. The substantive provision of RICO that the indictment charged Schwartz with having conspired to violate is section 1962(c). It provides in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

II.

Criden implicated Schwartz in this fictitious project before Schwartz had any knowledge of it or its principals. On Friday, January 18, 1980, Criden met with undercover agents Wald and Haridopolos at Philadelphia's Barclay Hotel. Wald told Criden that an Arab sheik was interested in constructing a large hotel complex in Philadelphia and desired advance assurances that there would be no zoning or labor problems. Criden hastily assured the agents there would be no such problems and suggested the possibility of dealing with Johanson, a member of the City Council, and Schwartz, its president. They discussed "the tariff" for each of the men and agreed to arrange a meeting with Councilman Johanson. The agents promised Criden a fee of $10,000 for introductions to Johanson and Schwartz.

With visions of the $10,000 in hand, Criden lost no time in returning that same evening with Johanson.

Johanson gave the agents the assurances they sought. The agents, in turn, presented him with *25,000. Wald than asked Johanson whether Schwartz could help the sheik and Johanson replied that Schwartz and Councilman Jannotti controlled the City Council. Johanson indicated that he would explore the possibility of arranging a meeting with Schwartz and Jannotti. He then departed. Criden remained and discussed with the agents how they might enlist the services of Schwartz and Jannotti and how much they might have to spend. At the end of the meeting, Wald gave Criden *5,000 for his personal services and promised him "five [more] for the next delivery."

Johanson never introduced Schwartz or Jannotti to the agents. Over the weekend he had second thoughts about his conversation with the agents and Criden. When Criden called Monday morning to arrange for a meeting with Schwartz, Johanson refused to make the introduction or to set up a meeting with Jannotti. There is no indication that Johanson had any subsequent involvement in the matter.

Criden had never met Schwartz, and he contrived to obtain an introduction through two intermediaries. He informed them that one of his clients wished to use Schwartz as a consultant. He then paid the intermediaries *3,000 for arranging the introduction.

On January 23, 1980, Schwartz made his first and only appearance on this stage. He met with Criden and agent Wald at the hotel. Criden informed Wald that he had discussed the project with Schwartz. Schwartz spoke enthusiastically of the positive business environment in Philadelphia. When the conversation turned to the question of obtaining zoning variances in advance of construction, Schwartz indicated that he controlled the City Council, as well as the Zoning Board of Adjustment and the Board of Building Standards.

Wald mentioned that his client had other investments in mind besides the hotel construction and asked whether Schwartz could "suggest" a local, politically savvy law firm. When Criden suggested Schwartz's former law firm, Blank, Rome, Comiskey & McCauley (Blank, Rome), Wald inquired whether that would create a conflict of interest. Schwartz replied that he had completely severed his relationship with the firm. He commented that the firm had expertise in all types of construction and financing and would be a proper firm to use for this kind of work. Criden offered to set up an appointment with the firm and to make the referral. Schwartz also suggested another major Philadelphia law firm, Wolf, Block, Schorr and Solis-Cohen. With respect to using his old law firm, Schwartz commented that "[t]here are certain protocol that should be worked out in advance and that's where the law firm Howard [Criden] will become involved. To put it together so that it doesn't boomerang."

Wald asked Schwartz if the "dollars we're talking are in the right ballpark." Schwartz replied that money was not his prime concern, and that his interest was in Philadelphia's economic and tax development. He confirmed Wald's statement that they had made a business deal and that the sheik had a friend in Philadelphia. Wald then handed Schwartz an envelope containing $30,000 and asked him if the sum was "appropriate." Schwartz took the envelope and departed, but not before advising Wald that he was "very much available" if the sheik required his future services. Following Schwartz's departure, Wald gave Criden the $5,000 he had previously promised him for Schwartz's "delivery."

Schwartz made his debut in this alleged conspiracy on January 23, 1980, and the record shows no further meetings between him and the agents. The day after the agents met with Schwartz, Criden arranged to have Jannotti meet with them. They met that evening and the agents again described the project. Jannotti promised to help. Wald then handed Jannotti an envelope with $10,000 and Jannotti left.

III.

Although the entire hotel project was imaginary, the law of this case is, as the majority has noted, that there is Hobbs Act jurisdiction. *See United States v. Jannotti*, 673 F.2d 578 (3d Cir.) (in banc), *cert. denied*, 457 U.S. 1106 (1982). On the record we have here, the conduct of Schwartz and Jannotti provides sufficient evidence to convict each of them of a Hobbs Act conspiracy. But whether the Government proved that Schwartz is also guilty of the RICO charge is an entirely different question. I believe the answer is that it did not.

The thrust of the statute, as is indicated by its title "Racketeer Influenced and Corrupt Organizations Act" and the language of sections 1962(a), (b), and (c), is the perversion of a business, organization, or enterprise through a pattern of racketeering activity. The principal purpose of Congress in enacting RICO was to protect legitimate businesses from the infiltration by organized crime by eradicating "the criminal means of acquiring, maintaining and conducting any enterprise affecting commerce." *United States v. Stofsky*, 409 F.Supp. 609, 613 (S.D.N.Y. 1973).[1]

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[1] "Title IX is aimed at removing organized crime from our legitimate organizations . . . . Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern *to obtain or operate* an interest in an interstate business, he is not subject to the proceedings under Title IX." 116 Cong. Rec. 585 (1970) (emphasis added), *quoted in* Note,*Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. Pa. L. Rev. 192, 205 n.74 (1975).

This purpose is demonstrated by the very structure of the statute's operative provisions. As to enterprises engaged in interstate commerce, section 1962(a) prevents the use or investment of racketeering income in the acquisition of any interest in such an enterprise. Section 1962(b) makes it unlawful through a pattern of racketeering activity to acquire a direct interest in or control of such an enterprise. Section 1962(c) reaches employees and persons already associated with the enterprise and prohibits them from conducting its affairs through a pattern of racketeering activity. The statute also provides severe mandatory forfeiture penalties for a section 1962 violation. 18 U.S.C. § 1963(a).[2]

The gravamen of a section 1962(d) RICO offense is not a conspiracy to commit bribery or some other predicate offense, but a conspiracy to operate or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity. The enterprise concept, a distinct element, is the focus of the RICO crime. "Although the provisions create a cluster of substantive offenses, a RICO violation, broadly speaking, arises from the use of power, acquired by crime, to gain or maintain a foothold in an enterprise that operates in interstate commerce." Bridges, *Private RICO Litigation Based Upon "Fraud in the Sale of Securities,"* 18 Ga. L. Rev. 43, 48 (1983) (hereinafter cited as "Private RICO Litigation")

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2. "A close reading of § 1962 . . . reveals that subsections (a), (b), and (c) are designed to work together to deal with the three different ways in which organized crime infiltrates and corrupts legitimate organizations . . . . All three sections considered together represent a unified plan to deal with the infiltration of legitimate organizations." Note, *Elliott v. United States: Conspiracy Law and the Judicial Pursuit of Organized Crime through RICO*, 65 Va. L. Rev. 109, 117 (1979); *see* H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. ———, *reprinted in* 1970 U.S. Code Cong. & Ad. News, 4007, 4033.

(footnote omitted). Thus, the court of appeals in *United States v. Mandel*, 591 F.2d 1347 (4th Cir.), *vacated on other grounds*, 602 F.2d 653 (1979) (in banc) (district court's order granting judgment N.O.V. on the RICO charge undisturbed), *cert. denied*, 445 U.S. 961 (1980), approved the district court's holding "that the 'conduct or participate' language in section 1962(c) required some involvement in the *operation* or *management* of the business . . . ." 591 F.2d at 1376 (emphasis added). Section 1962(c) "requires more than merely some connection or even a 'substantial nexus' between a lawful enterprise and the prohibited pattern of racketeering." *United States v. Webster*, 639 F.2d 174, 185 (4th Cir.), *cert. denied*, 454 U.S. 857 (1981), *modified* 669 F.2d 185 (1982).

In discussing what constitutes a conspiracy under RICO, this court in *United States v. Riccobene*, 709 F.2d 214 (3d Cir.), *cert. denied*, 104 S.Ct. 157 (1983), reasoned that:

> An agreement merely to commit the predicate offenses would not be sufficient to support a RICO conspiracy. Nor is it sufficient if the defendants merely participate in the same enterprise. . . . This is so because, under RICO, it is an agreement "to conduct or participate . . . in the conduct of [an] enterprise's activities" through the commission of predicate offenses that is prohibited, not an agreement to commit a pattern of racketeering activity alone.

Id. at 224. This statement in *Riccobene* reflects the fear that Congress had that organized crime could obtain a foothold in the commerce and industry of the country and from there "intimidate all competition out of the market. The results of this activity would be the typical antitrust vices of monopolization, price fixing and so forth." *Private RICO Litigation*, *supra*, at 70. These concerns were expressed during the Senate and House hearings. *Id.* at 70, n.136. In *United States v. Turkette*, 452 U.S. 576 (1981), the Supreme Court recognized that a great concern of Congress in enacting RICO was "the infiltration of legitimate businesses," *id.* at 592-93, and resolved a much disputed question by holding that the statute also reached the operation and management of criminal enterprises.

IV.

In this case, the indictment charges that Schwartz conspired to conduct and participate in the conduct of the affairs of an enterprise -- the Criden, Johanson, Dolan, Morrissey & Cook law firm -- through a pattern of racketeering activity. Proof of an agreement only to participate in a conspiracy to commit two or more predicate crimes of bribery is insufficient to establish a RICO violation. "More specifically, to convict for conspiracy to violate RICO the government must prove that the person objectively manifested through words or actions, an agreement to participate in the conduct of the affairs of the enterprise through the commission of two or more predicate crimes." *United States v. Martino*, 648 F.2d 367, 394 (5th Cir.), *cert. denied*, 456 U.S. 949 (1982). *Accord United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 103 S.Ct. 1249 (1983). And under *United States v. Mandel*, *supra*, the required proof must demonstrate "some involvement in the operation or management of the business." 591 F.2d at 1375.

Applying these principles of RICO construction, this court held in *United States v. Provenzano*, 688 F.2d 194, 200 (3d Cir.), *cert. denied*, 103 S.Ct. 492 (1982), that a union officer who accepted bribes in exchange for the union's countenancing of the violations by employers of collective bargaining agreements was conducting union affairs through a pattern of racketeering activity. It was the conduct of the union office that provided the requisite element for the RICO offense. The court observed, however, that "when the predicate acts are unrelated to the enterprise or the actor's association with it [then] the nexus element is missing, and consequently there is no RICO violation." *Id.* at 200. I read this language to mean that the predicate acts must be related to managing or participating in the operation of the affairs of the enterprise. The evidence does not support such a conspiracy here.

The Government might have proven that Schwartz, as president of the City Council, had conspired to conduct the affairs of the Council through a pattern of racketeering activity.[3] *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978), could have been an analogue for such an indictment and prosecution. The Government, however, chose to indict Schwartz and Jannotti for conspiracy to conduct and participate in the conduct of the Criden, Johanson, Dolan, Morrissey & Cook law firm. There is nothing to show that Schwartz was even in the firm's office, or that he used its telephones, library, or facilities. The pertinent evidence does not prove that Schwartz had any intention or objective of conspiring to conduct or participate in the conduct of the affairs of that firm.

Further, although Criden, a partner in the firm, played a key role in inducing Schwartz to accept the bribe, the evidence demonstrates that Criden was acting in his personal capacity -- not as a member of the law firm -- to pick up some fast money by merely introducing the agents to Schwartz, Jannotti, and Johanson. None of these meetings was concerned with the conduct of the affairs of the law firm. Not one bit of evidence was introduced to show any firm record of any transaction pertaining to the conspiracy to bribe. The firm never opened a record, or made a note in connection with the transactions, despite its usual practice of opening a file whenever a matter became firm business. True, Criden and Johanson shared some of the money with Cook, a partner, but they shared the money among themselves and not with the firm. They placed the funds in a special safe deposit box. Neither the monies they received, nor the safe deposit box in which they stored the cash, were registered with the firm. The safe deposit box, opened the year before, had been registered in the individual names of Criden and Cook and only they had access to it. They later added Johanson's name. The record demonstrates that the box did not belong to the firm.[4]

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[3] Evidence in support of such a conspiracy might have been found in a meeting between Criden, Schwartz, and Jannotti prior to Jannotti's meeting with Wald. Schwartz advised Jannotti that these "people . . . want to be assured that they are not going to have any problems, they want your support, want you to go up with [Criden] tonight and meet these people tonight and get your 10 thou, okay." In addition, Cook testified that Criden gave Schwartz some money for introducing Criden to Jannotti.

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[4] Cook testified on cross examination:

Q: And when that safe deposit box was opened, it was not opened in the name of the law firm of Criden, Johanson, Dolan, Morrissey & Cook, is that correct?

A: Yes sir.

Q: And, specifically, what was the name under which that safety deposit box was opened when it was initially opened?

A: I don't know. It was Criden and Cook, or through Criden & Ellis Cook, but was the two of us.

Q Whichever one it was specifically not in the name of the firm, but in the name of you and Mr. Criden?

A. Yes sir.

The record discloses that at all times Criden acted on his own -- not in his capacity as a member of the law firm -- in dealing with Wald and his mythical sheik. Criden engaged in a pattern of racketeering activity for Criden personally, not in behalf of the law firm or in the name of the law firm. He involved Johanson in his capacity as a member of City Council, not in his role as a member of the law firm. He sought nothing from Johanson that involved the firm. Although he directed Cook to withdraw $3000 from the safe deposit box, Criden instructed Cook that this money was to be advanced to pay bills of the firm.[5] This "advance" by Criden to meet a cash shortage in the firm is hardly evidence that Schwartz conspired to conduct the firm's affairs "through a pattern of racketeering activity."

Even if Criden were engaged in RICO racketeering activity, Schwartz's and Jannotti's limited association with him does not *ipso facto* make them guilty of a RICO conspiracy unless they conspired with him to violate the substantive provisions of section 1962(c). Although Schwartz's betrayal of the public trust is indefensible, his recommendation of a law firm to represent the sheik does not expand a conspiracy to violate the Hobbs Act into a RICO conspiracy. Wald asked Schwartz to "suggest" a law firm to handle legal work for his principal and Schwartz gave him the names of the firm of Blank, Rome and the firm of Wolf,

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Q. And at no time was that box in the name of -- I don't want to repeat that whole long name of the law firm --

A. No, it was not sir.

(621A)

[5] These funds were not transmitted to the law firm as fees or income, as the majority seems to suggest, typescript op. at 28, n.4., but were merely a unilateral "advance" by Criden personally.

Block, Schorr & Solis-Cohen. Wald made no selection but Criden intended to push the legal business to Blank, Rome, perhaps in the hope that he might obtain a "referral fee." During a luncheon a week later with a Blank, Rome partner, Schwartz mentioned the recommendation that he had made in connection with the projected hotel complex and suggested that Criden might want to participate in fees. The evidence shows that Criden's expectation of a financial benefit from the legal work presumably to be accomplished by Blank, Rome was not for any legal services to be performed by Criden or his law firm, but was merely a form of "referral fee" to accrue to him personally. Furthermore, as Schwartz pointed in his luncheon conversation, "Mr. Criden's firm could not participate in the legal representation of this enterprise, nor could Mr. Criden." The suggestion of the Blank, Rome or Wolf, Block law firms is not evidence of any intention by Schwartz to conduct the affairs of the Criden, Johanson firm.

There is not the slightest evidence that Schwartz conspired to conduct the affairs of the firm when he accepted a payoff from Wald. The purpose of the January 23 meeting with Schwartz was solely to have him accept a personal bribe. The separate meetings with Johanson and Jannotti had a similar purpose. The undercover agents enlisted Criden's services only because they knew from their prior Abscam dealings with him that he would be a willing tool in setting up Philadelphia councilmen for the bribery "sting." Even though Criden did not know Schwartz or Jannotti, he contrived to meet them and separately introduce them to the agents to advance the bribery plans. In each instance, the councilmen were on venal journeys of their own; none of the journeys entailed conducting the affairs of the firm of Criden, Johanson, Dolan, Morrissey & Cook. Rather than revealing a conspiracy to conduct the affairs of the firm through a pattern of racketeering activity, the record shows that the essence of the conspiracy was to bribe Schwartz and Jannotti in return for illegal favors from City Council.

V.

In conclusion, I would affirm the conviction of the appellants under the Hobbs Act. I would reverse Schwartz's conviction under the RICO Act and remand to the district court with directions to dismiss count II (the RICO count) of the indictment.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-1093 & 83-1094

No. 83-1093
UNITED STATES OF AMERICA
v.
JANNOTTI, HARRY P.,
Appellant

No. 83-1094
UNITED STATES OF AMERICA
v.
SCHWARTZ, GEORGE X.,
Appellant

(D.C. Crim. 80-00166-02 & 80-00166-04)
on Appeal from the United States District Court
for the Eastern District of Pennsylvania

Present: SEITZ, *Chief Judge*, GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 12, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered February 1, 1983, be, and the same are hereby affirmed.

Attest:

Clerk

February 21, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1094

UNITED STATES OF AMERICA
v.
GEORGE X. SCHWARTZ,
Appellant
(Criminal No. 80-166-04 — E.D. Pa.)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, and ROSENN *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitiled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Collins J. Seitz
Chief Judge

DATED: March 20, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1094

UNITED STATES OF AMERICA
v.
SCHWARTZ, GEORGE X.,
Appellant

Pursuant to rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until May 19, 1984.

Chief Judge

Dated: March 28, 1984

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SCHWARTZ JUDGMENT]

EDITOR'S NOTE

PAGES PA44 and PA45 WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

for EASTERN DISTRICT OF PENNSYLVA

DEFENDANT George X. Schwartz

DOCKET NO. 80-166-4

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/74)

In the presence of the attorney for the government J. Rohn, Esq. the defendant appeared in person on this date

MONTH	DAY	YEAR
01	31	83

COUNSEL

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Richard A. Sprague, Esq.
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☐ NOT GUILTY

PA-44

FINDING & JUDGMENT

There being a finding/verdict of ☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of

Conspiring to obstruct interstate commerce in violation of the Hobbs act. Ct.3
Conspiring to violate the Racketeer Influenced and Corrupt Organization Act Ct.2

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year and one day as to count number two, as to count number three the defendant is fined $10,000.00 (Ten Thousand Dollars)

SPECIAL CONDITIONS OF PROBATION

Jannotti - 6 mos/2,000.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON

THIS DATE 1/31/83

BY

( ) CLERK

( ) DEPUTY

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

Date Jan 31, 1983

DEFENDANT HARRY P. JANNOTTI

DOCKET NO. 80-166-2

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO-245 (6/

In the presence of the attorney for the government J.Rohn,Esq.
the defendant appeared in person on this date

MONTH	DAY	YE
01	31	

COUNSEL

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desire
have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL J. VClayton Undercofler,Esq.
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,
☐ NOLO CONTENDERE,
☐ NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of
☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of

Conspiring to obstruct interstate commerce in violation of th
Hobbs Act Ct.3

SENTENCE

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the con
was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defenda
hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six

SENTENCE OR PROBATION ORDER months plus a fine of $2,000.00 (Two Thousand Dollars)

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out o
reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, a
any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and re
probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliv
a certified copy of this judgme
and commitment to the U.S. Ma
shal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

Date January 31 '83

CERTIFIED AS A TRUE COPY O

THIS DATE 1/31/83

By

( ) CLER

(✓) DEPU

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JANOTTI JUDGMENT]

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1020 and 81-1021

UNITED STATES OF AMERICA
Appellant in No. 81-1020

v.

JANNOTTI, HARRY P.
(D.C. Crim. No. 80-00166-02)

UNITED STATES OF AMERICA,
Appellant in No. 81-1021

v.

SCHWARTZ, GEORGE X.
(D.C. Crim. No. 80-00166-04)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 10, 1981

Before: ALDISERT, WEIS, and SLOVITER, *Circuit Judges*

Reargued In Banc November 23, 1981

Before: SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS,
GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

(Opinion filed February 11, 1982)

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Assistant United States Attorney
Chief, Appellate Division
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COUNSEL FOR APPELLEE
GEORGE X. SCHWARTZ

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

On September 16, 1980, after a six-day trial, a jury found defendants Harry P. Jannotti and George X. Schwartz guilty of conspiring to obstruct interstate commerce, in violation of the Hobbs Act, 18 U.S.C. §1951(a), and found Schwartz guilty of conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(d). At the time of the events charged in the indictment, Schwartz was president of the Philadelphia City Council and Jannotti was the Council's majority leader. Following the entry of the guilty verdicts, defendants renewed their requests for judgments of acquittal and dismissal of the indictment, on which the trial court had previously reserved decision. On November 26, 1980, the district court entered an order setting aside the verdict of the jury in its entirety, dismissing Count III of the indictment (the Hobbs Act count) for lack of jurisdiction, and granting the motions of defendants for judgment of acquittal. The Government appeals.[1]

In his opinion accompanying the order, the trial judge gave four reasons for entry of the judgment of acquittal and dismissal of Count III of the indictment. *United States v. Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1980). He concluded:

---

[1] The government suggests that we have jurisdiction under 28 U.S.C. §1291. That section does not create appellate jurisdiction over appeals by the United States in criminal cases. DiBella v. United States, 369 U.S. 121, 130 (1962); Government of the Virgin Islands v. Hamilton, 475 F.2d 529 (3d Cir. 1973). However, we have jurisdiction over these appeals pursuant to the Criminal Appeals Act, 18 U.S.C. §3731. *See* United States v. Wilson, 420 U.S. 332 (1975); United States v. Schoenhut, 576 F.2d 1010, 1018 & n.7 (3d Cir.), *cert. denied*, 439 U.S. 964 (1978).

1. The evidence at trial did not establish the actual or potential impact upon interstate commerce necessary to sustain federal jurisdiction under the Hobbs Act;

2. The evidence at trial established entrapment as a matter of law;

3. Governmental overreaching amounted to a violation of due process of law;

4. The circumstances relied upon to establish federal jurisdiction were artificially created. *Id.* at 1205.

Our review of the record and applicable law convinces us that in reaching these conclusions the district court erred in its legal analysis and usurped the function of the jury to decide contested issues of fact. We reverse the district court's order and direct reinstatement of the jury's verdict.

I.

SUMMARY OF EVIDENCE

An understanding and appreciation of the evidence presented to the jury is essential to consideration of the issues facing us on this appeal. We have therefore undertaken an exposition of some of the highlights of that evidence. The government operation, which has come to be known as ABSCAM, began some time in 1978. The basic nature of the plan was that F.B.I. agents posed as employees of Abdul Enterprises, a fictional multinational corporation whose principal, a fictional Arab Sheik, Yassir Habib of the Arab nation of Abu Dhabi, was represented as interested in investing large amounts of money in this country and in emigrating here. According to the government, the plan was "conceived to create opportunities for illicit conduct by public officials predisposed to political corruption." Brief for Appellant at 6. From the very beginning the government utilized the services of Melvin Weinberg, accurately characterized by the district court as a "career swindler," 501 F. Supp. at 1193,[2] who, with F.B.I. agents, "spread the word" that the Sheik was interested in meeting public officials who could facilitate his planned investments.

This basic plan evolved into various subparts, each with its own cast of participants, which were ultimately the subject of a series of indictments returned by grand juries sitting in various federal districts of the country. Thereafter, a number of local and federal public officials were tried on offenses arising out of their participation. We focus on the facts material to the prosecution of Jannotti and Schwartz in the Eastern District of Pennsylvania.[3]

The Philadelphia phase began on January 11, 1980 when Weinberg called Howard Criden, a Philadelphia attorney, and told him that the Sheik was "looking to build a hotel" in Philadelphia. Criden, who had previously received money from the F.B.I. agents for arranging introductions to congressmen in connection with another phase of the ABSCAM operation,[4] was told that two representatives of the Sheik would be coming to Philadelphia to begin discussions. Weinberg suggested that they be introduced to Congressman Myers or Lederer, and asked Criden which one would be better.

---

[2] Weinberg was convicted of mail fraud and wire fraud in 1977. At the intercession of the government, he was sentenced to three years probation in return for his agreement to help in the ABSCAM investigation. He was paid $3,000 a month by the F.B.I. as of the time of the trial, had received a total of approximately $140,000 up to that time, and had also received other fringe benefits.

[3] The trials of two other defendants, Louis C. Johanson, a member of Philadelphia City Council, and Howard L. Criden, a Philadelphia attorney, who were indicted along with Schwartz and Jannotti were severed from that of Schwartz and Jannotti. Both Johanson and Criden were convicted on similar charges in the United States District Court for the Eastern District of New York, and the government moved for their dismissal as defendants here.

[4] Criden, Johanson, and Mayor Errichetti of Camden, New Jersey, were instrumental in arranging for four congressmen, including Philadelphia Congressmen Myers and Lederer, to meet the F.B.I. agents. At the meetings the congressmen agreed to introduce immigration bills in return for money, leading to their ultimate indictment and conviction.

> CRIDEN: Well, I got to hear what you want to do first, and . . . you know.
> WEINBERG: I think they're looking to build a hotel there. I'm not sure. That's only what I heard.
> CRIDEN: Okay. Why don't you tell him to find out more particulars because I don't know that either one would help you in that department. We may be able to give you more help to them.
> WEINBERG: Who do you know there?
> CRIDEN: Everybody!
> WEINBERG: Everybody?
> CRIDEN: Everybody!
> WEINBERG: All right. I'll . . . I'll.
> CRIDEN: Remember. I got a partner who's a city councilman.

A211-12.

A week later, on January 18, 1980, Criden met with F.B.I. agents Michael Wald and Ernest Haridopolos at the Barclay Hotel in Philadelphia. Wald and Haridopolos used the names Michael Cohen and Ernie Polos in their dealings with defendants throughout these events. That meeting was among the group of meetings at the Barclay recorded on videotape by the F.B.I. Wald told Criden that the Sheik was interested in building a hotel in South Philadelphia, that Wald's role was to address himself to possible problems such as zoning, condemnations, and variances. A351. Criden stated, "You don't have any problem. You got you two of the strongest guys" [referring to Myers and Lederer]. Wald responded, "He [Sheik] wants to be assured that municipal government and he can coexist." Criden asked, "How do you want me to satisfy you," to which Wald responded, "I'm sure the easiest way for me to deal with someone in municipal government and I can go back . . . Titles impress the man, as you know, from past experience . . . . If he receives those assurances from someone with a title sounds appropriate, eh, I buy it, he buys it." A351-53.

Wald asked Criden about the municipal setup, including city council. Criden explained that Philadelphia City Council is composed of 12 district councilmen and five at-large councilmen, that his "partner [Johanson is] a district councilman", and that the president of city council, Schwartz, "is a powerful guy" who had been "president of city council for maybe now ten, twelve years, already now. Has got power." Wald responded, "He's the man." A354-55. Wald later asked:

> WALD: Can we deal with Mr. Schwartz.
> CRIDEN: Oh, sure.
> WALD: He seems like the type of person we . . .
> CRIDEN: Oh, sure.
> WALD: Can I deal with him while I'm here in town?
> CRIDEN: I don't know. I gotta get hold of my partner.
> WALD: Can I deal with your partner?
> CRIDEN: Oh, sure.

A357. After some discussion of timing and the proper "tariff," Wald asked if he could talk candidly with Johanson. Criden responded that "As far as Johanson is concerned, you can talk as candidly as you want." With regard to Schwartz, he stated, "He may want to handle it indirectly." A367. Wald expressed some concern, stating that under no circumstances would he want to disappoint his employer.

> CRIDEN: Listen, Mike, I, I read you loud and clear and if I was sitting in that chair, I would feel exactly the same way ok. You have no problems with me.

WALD: Ok. How do you want to work this? Eh, do you wantta call me back here concerning . . .

CRIDEN: Oh sure.

WALD: Mr. Johanson.

CRIDEN: I'll get back to you in the next couple hours.

WALD: Alright.

CRIDEN: If I can serve him up.

A368-69. Wald then asked what the "tariff" would be for Johanson and Schwartz, and Criden replied "[t]wenty-five" for Johanson, A375, and "[a]nother fifty" for Schwartz. A376. Wald demurred at the latter figure, and Criden asked, "You wanta go thirty on this guy?" Wald asked, "will he bite at thirty? . . . I mean does that take care of him?" and Criden replied, "Let me try it . . . . I'll run it up the flagpole." A376-77. Finally Criden raised the subject of his fee and asked for and was promised "ten for both of them." A377.

Several hours later, Criden returned with Johanson to the Barclay suite where Wald and Haridopolos waited. Wald again discussed the proposed hotel construction, explained that he wanted to avoid delays due to the need for a variance or a building permit, and received Johanson's assurances that the inspectors from Licenses and Inspections, the building inspectors, the plumbing inspectors, and the electrical inspectors are "not gonna monkey with you, for a minute because they're gonna be told not to . . . because the words gonna come down, that this is a vital project." A421. In discussing the political situation in Philadelphia, and City Council in particular, Johanson boasted that of the 17 councilmen, he and Schwartz was each a "very bright fella", and "after that there ain't a brain in the closet." A415. He spoke of his and Schwartz' importance, and stated that Schwartz, Jannotti and he "run the City Council." A450. Wald then asked about Jannotti:

> WALD: Would he be interested in doing business with us.
>
> JOHANSON: I don't know that it's necessary but if you want to we can.
>
> WALD: I don't know — if it is -- you're the best judge of that.
>
> JOHANSON: I think George is ah —
>
> CRIDEN: Well, it might not be a bad idea to bring Harry up.
>
> JOHANSON: We can bring Harry up. Harry's the Majority Leader. He's the — ya know, second in command.
>
> WALD: Yea.
>
> JOHANSON: He's got seniority.

A453-54. After some additional discussion, the following exchange took place:

> HARIDOPOLOS: Are you acquainted with how much ah, ya know, ah for the favor and for all these assur — assurances, right.
>
> CRIDEN: Right.
>
> HARIDOPOLOS: You know how much it is?
>
> JOHANSON: Sure.
>
> HARIDOPOLOS: How much is it?
>
> JOHANSON: Twenty-five.
>
> HARIDOPOLOS: Okay, ah but, of course, ah, we have to have these proper assurances. You do us a favor, we're doin you a favor.
>
> CRIDEN: Obviously.
>
> JOHANSON: Sure.

A471. Johanson gave his assurances and received $25,000. A480. The following exchange took place:

> WALD: And for 25 we've got a friend.
>
> JOHANSON: Right.

A477. The conversation turned to Schwartz:

> WALD: Can I talk to Mr. Schwartz as I have spoken —

JOHANSON: Next week —
WALD: — to you gentlemen —

. . .

WALD: [F]rankly . . .

. . .

CRIDEN: If you can't have the same discussion with George, . . . you won't have the meeting.

A485. Wald asked the same question about Jannotti. Criden promised to let him know whether he could have the same kind of conversation with Jannotti. A490. After Johanson left, Haridopolos gave Criden $5,000 and promised another "five for the next delivery." A501.

Criden, who did not know Schwartz personally, arranged for Schwartz to meet the F.B.I. agents through an intermediary, Judge Thomas Shiomos of the Court of Common Pleas of Philadelphia County, who lived in the same apartment hotel as Schwartz. Shiomos testified at trial that at a meeting on January 21, 1980 between him, Criden and their mutual friend, Mr. Kattleman, Criden told him of the proposed hotel construction, asked him if Schwartz would be interested in talking to "these people . . . for the purpose of giving them his advice with regard to building this complex in Philadelphia," and indicated that the investors were willing to "pay for [Schwartz'] advice." A639-40. Shiomos thereafter met with Schwartz, advised him that Criden had wealthy Arab clients who wanted to invest $150 million to build a hotel in Philadelphia, and indicated to Schwartz that Criden had said there "would be a fee for Mr. Schwartz for his advice" and "that Mr. Criden expected part of that fee." A643. Schwartz stated that he "would be interested in anyone who is willing to invest $150 million." Shiomos stated when he left that he didn't think there was anything "improper" but that if Schwartz "thought there was anything improper or fishy [Shiomos was] sure if [Schwartz] met with Mr. Criden that [Schwartz] could determine that." A644.[5] Thereafter Criden spoke with Schwartz. That discussion was not taped or recorded, and there was no trial evidence as to the contents of the conversation.[6]

On January 23, 1980, Criden and Schwartz visited Wald at the Barclay suite. This conversation was videotaped. Criden stated that he and Schwartz had "spoken at length" and that Schwartz knew that those persons whom Wald represented were "interested in building a hotel facility in Philadelphia that may amount to some 30 or 40 million dollars." A689. Wald explained his purpose:

> WALD: Well, what I have been instructed to do and the purpose for ah my visits to to Philadel-

---

[5] Some time after Schwartz attended the January 23, 1980 meeting at the Barclay, Shiomos and Kattleman went to Kattleman's apartment where Criden lay $6,000 on the table as the fee to be paid to Shiomos and Kattleman. Shiomos assumed this was a portion of Criden's share of the fee that was paid to Schwartz. A654. Shiomos testified he gave his $3,000 share to Kattleman. A655.

[6] In his post-trial testimony, Criden testified:

> Q. All right, now, when you went and saw Mr. Schwartz after Judge Shiomos had arranged for the interview, did you tell Mr. Schwartz that the purpose for Mr. Schwartz going there is to be a consultant for these Arabs or the Arab representatives?
>
> A. To some degree, yes.
>
> Q. You say to some degree —
>
> A. I told Mr. Schwartz there would be a consulting fee involved and I explained the project to him and I also told Mr. Schwartz that I had represented these people and had done business with them for some period of time and that he would receive a consulting fee.
>
> Q. Did you tell Mr. Schwartz at any time prior to his going to that meeting that the purpose of the meeting was in a sense to fix him and to arrange for him to take care of matters in front of City Council?
>
> A. No, sir.

A3317.

> phia is to firm up uh, what we consider to be a major investment here and uh the gentleman cares to make a major investment here because he seems to like Philadelphia, and he has been told that it would uh be in his best interest to have an investment, uh, in an area where he, uh, would like to take up rather permanent residence and Philadelphia is it.
>
> SCHWARTZ: Philadelphia is a nice city. Philadelphia has been on the move since 1952. And, uh, business climate in Philadelphia is good.

A690. Wald continued:

> WALD: Uh, and we want to put one up. Now we know that there are problems inherent in any major construction, uh, in this city and any other city. What I am trying to do is take care of any potential problems long before they exist. We're not breaking ground tomorrow morning. We can forsee certain problems such as, uh, uh, zoning and variances and this type of thing . . . municipal government, how it effects those various things, but we don't want to be faced with problems down the road.

A691-92. Schwartz responded to this overture with a soliloquy on his own political power and importance. After explaining how close he was to the mayor[7] and that he was "sort of a protege" of the mayor's deceased father, who had been Chairman of the [Democratic] party, Schwartz stated:

> SCHWARTZ: . . . Unfortunately then he died in '63. And I have been close to every chairman since. I am a member of the Democratic National Committee. I am a member of the State Committee.

---

[7] There is no evidence that William Green, Philadelphia's then newly elected mayor, was ever involved in or knew of the transactions at issue. In fact, Criden described Green as "an All American boy", A343, and advised Wald that it would be "a critical mistake" to approach him. A372.

I am a member of the City Committee. A Ward Leader. I, uh, I have a ward — if you know what that means in politics.

A693. A few minutes later, Wald asked:

WALD: Is it fair to say that by doing business with you, uh . . . my zoning problems become . . .
SCHWARTZ: Right.
CRIDEN: You, you don't have any.
WALD: Okay. Now. There are what, 17 members, as, as you say . . . and also what uh I read here . . .
SCHWARTZ: Right.
WALD: Uh, do we have a uh controlling vote . . .
SCHWARTZ: Yes.
WALD: . . . problem here?
SCHWARTZ: No . . .
WALD: Uh.
SCHWARTZ: No.
WALD: Can you control . . .

. . . .

WALD: . . . those types of factions?
SCHWARTZ: Yes.
WALD: You can control them?

. . . .

SCHWARTZ: The proof was today. The proof was the election of myself as president again.
WALD: Uh hmm.
SCHWARTZ: In other words, we got uh five or six now [sic] members that came in. Uh, you tell me your birth date. I'll give them to you for your birthday.

A695-6. The essence of Schwartz' representations of control was repeated shortly thereafter:

WALD: All right. You're controlling the council at this point.

SCHWARTZ: Right.
WALD: As far as I'm concerned.
SCHWARTZ: Right.
CRIDEN: Right. And has been for . . .
SCHWARTZ: Right. Right.
WALD: Should we have anything that comes up to a vote, that has to be done on a vote basis, the council is with you.
SCHWARTZ: Yes.
WALD: You control them at this point.
SCHWARTZ: Yes. Yes. Yes.
CRIDEN: 100 percent.
SCHWARTZ: Yes.

A709. Schwartz stated that although he could not promise that the hotel project would not have problems, those problems would not be "insurmountable" as long as the project "is a proper project." A698. Wald stated, "I am not putting up a cathouse", Criden interjected, "It's going to be legitimate", and Schwartz responded, "That I take for granted, or I wouldn't be here." A710. Wald then asked Schwartz for assurances of his support if the project "violates some minor . . . type statute or ordinance or . . . something", and Schwartz replied:

SCHWARTZ: There is a Board of Building Standards. There, there is built-in relief every stage of the way. There's a Zoning Board of Adjustment for variances.
WALD: Okay. Can you control that?
SCHWARTZ: Yes . . . .

A711. Immediately thereafter he explained, "if it isn't something that is outlandish, if it is something that should and can be handled, and I can, I can't think of anything that couldn't be handled . . . [t]hrough a variance procedure of some kind." A712. Wald stated:

WALD: Okay. Meaning that, if City Council has to vote on it, we don't have a problem at this point?

SCHWARTZ: Well, I'm going further. There are other boards and agencies, uh, depending upon what your client, how idiosyncrant he wants to be and how eccentric he wants to be.

WALD: (Laughter) . . . They can become rather eccentric.

SCHWARTZ: All right. All right. It may be necessary to go to these various boards and commissions. Now, they are part of the organization. They are part and parcel and . . .

WALD: Appointed, appointed officials?

SCHWARTZ: Yes, they are appointed officials. Uh, but uh, as I say, uh, I always do my homework. And, uh, the mayor is a very strong mayor. We have a strong mayor form of government. And all these people are his appointees. My understanding with him is that I go to him — period. I don't even have to go to one of the flunkies, one of the functionaries. I go to him . . . .

A712-13. After additional discussion which concerned local law firms that could be employed by the hotel project, the economic climate in Philadelphia, and the encouragement received by business from the city, Wald referred to Schwartz' compensation:

WALD: Our time frame is growing short, but we don't have those type of problems. We don't have that built-in resentment. Ah . . . We've talked to Howard, you know, the figures, the dollars we're talking are in the right ballpark. We're . . .

SCHWARTZ: That's not my prime concern. I'm interested in the City of Philadelphia. I'm interested in a good project. I'm interested in tax rateables. I want to see Center City develop. Especially Center City. There are a few parcels left. Well anything else that's going to add to the tax rateables of the city that's going to create jobs.

> WALD: I am again quick to say that I'm not really interested in the City of Philadelphia to be candid.
>
> SCHWARTZ: Well I have to be. I have to be.
>
> WALD: Perhaps, oh sure . . . (inaudible) . . .
>
> CRIDEN: Your primary concern is to see that if your employer decides to move, you have a minimum amount of problems.
>
> WALD: Exactly . . . . Problems are to be handled before they arise. Right. Should any minor problems come up. Should any problems that are councilmatic in scope . . .
>
> SCHWARTZ: No problem.
>
> WALD: You could take care of them. Those are the type of things . . .
>
> SCHWARTZ: Right.
>
> WALD: That he asks I make an unequivocal, yes, it's been handled, it's been taken care of and uh . . .
>
> CRIDEN: You make that an unequivocable yes.
>
> SCHWARTZ: It's . . . I would say to you that it's much easier now than it is than it was four years ago.

A746-47. The conversation returned to the nature of the understanding:

> SCHWARTZ: There are administrative escape hatches for everything in the City of Philadelphia under our various codes. There's a way of doing it — administrative way of doing it.
>
> WALD: Okay, and that is the type of thing you can handle for us.
>
> SCHWARTZ: Oh yeah, right.
>
> WALD: I can go back and say I met a gentleman. We had a business deal uh. I've made a friend in Philadelphia.

SCHWARTZ: Yes.

. . . .

WALD: And things are taken care of . . .
SCHWARTZ: Right . . .
WALD: Okay, and the sums appropriate and we're in good shape. Okay.

A753-54.

Shortly thereafter as seen on the videotape, Wald opened his briefcase and, without discussion of the amount, handed Schwartz an envelope [containing $30,000 cash], which Schwartz placed in his jacket without counting. The nature of the commitment Schwartz made was reiterated:

WALD: The legislative problems we've taken care of?
CRIDEN: No problem.
WALD: Okay, that I can, that I, that I got assurance on.
SCHWARTZ: Right.
CRIDEN: You have, you have no problem.
WALD: Okay, the other things can be done through attorneys, but the legislative problems don't exist anymore?
CRIDEN: That's right.
SCHWARTZ: No. Do not.
WALD: Okay.

A756.

Criden remained behind and received his $5,000 fee for arranging the meeting. A758. He admitted to Wald that he had to give "something" to someone to make the approach to Schwartz. A763. Wald indicated an interest in talking to Jannotti if he was "amenable" because both Criden and Johanson had referred to Jannotti "as a power." A770. Criden undertook to ascertain to "try to do something" with Jannotti and "if the answer is no, I'm going to tell you right off the bat, forget it." A778. They discussed the amount of the payment to

Jannotti, Wald asking "Will he run with five" and Criden replying "Maybe ten . . . [L]et me run it up the flag pole with him." A779-80. Wald asked whether he should deal with anybody else on the executive side and was told that there was no one else he could or should do business with. Criden promised to communicate with Wald the next day and departed.

The next evening, January 24, 1980, following telephone arrangements, Jannotti and Criden arrived at the Barclay suite to meet with Wald and Haridopolos. Jannotti had been briefed by Criden and Schwartz earlier that day who had "explained the whole situation." A848. With Jannotti, as with Schwartz, Wald explained "I'm only here for one reason, to bring back some assurances." A849. He continued:

> WALD: [W]e are prepared to make a major investment in this city, alright, and, ah, we have incredible funding but it's still a major investment even for the people that I represent at this time. Ah, it's not a drop in the bucket even for them. It's a fair amount of money and ah, the way these people do business, is somewhat different than the way we do business in this country, they don't think. They just can't tolerate nor can they put up with psychologically any problems that arise. Now these type of problems do arise but they can be handled, but the type of problems that would get back to my employer. Ahe, he can't deal with them, and he turns to me and says I thought we had all this settled in Philadelphia. So, that's why I'm here, simply to take care of any problems now.
>
> JANNOTTI: Far in advance.
>
> WALD: Ah, it's really not that far I don't think.
>
> CRIDEN: Well . . .
>
> WALD: But at least enough in advance that ah when the time comes it's over and done with everything is nice. Ah, those problems are simply the

ones that I can forsee and you haven't come up with anymore than you and I had been worried about nor has the other gentleman I dealt with, and that would be ah, ah, the zoning, any variances that we have to obtain any, ah, committee type things we'd would have to, ah, deal with, with City Council ah, inspections, licensing the whole gamut, ya know the whole thing, well you were in that type of business in, in an allied situation and I'm sure you can appreciate the petty things that arise, ah, that have to be handled.

JANNOTTI: First of all you, you're going to invest a substantial amount of money and, ah, what you'll be doing is bringing into the City of Philadelphia a substantial amount of money, and this will create jobs, will create a tax base and ah from what I gather everything that you want to do with be strictly, ah, on board. I mean there's nothing phony about it.

WALD: It's a legitimate operation.

JANNOTTI: As long as it's, long as it's a legitimate, legitimate operation. Ya know, any legitimate operation we will fight for because, ah, ya know why shouldn't we fight for a legitimate operation? If the operation is legitimate, it's going to bring a tax base into the City of Philadelphia, it's going to bring employment into the City of Philadelphia, ah, this is, this is basically our job, ah George George's job and my job, ah, to try to get as much money into the City of Philadelphia and as many jobs into the City of Philadelphia as we possibly can.

A849-51. Wald asked:

> WALD: [B]y dealing with you here this evening and, and the gentleman I, I spoke with last evening, can I go back with those assurances?
>
> JANNOTTI: I don't see why not, as you say, ya know it's a legitimate project and you have your fi-

> nancing, there's nothing ah, there's nothing that you're doing illegal . . .
>
> CRIDEN: Michael wants to be sure that he has a friend if he has a problem.
>
> JANNOTTI: Oh certainly.
>
> WALD: If something arises, if something arises that needs a City Council vote to be very specific, a City Council vote is needed on the thing, can I count on your vote?
>
> JANNOTTI: Why sure . . . . first of all we'll go over it again, you have a legitimate project, ah, you're going to invest 36 million dollars in the City of Philadelphia, which is going to create a tax base and going to create employment.
>
> WALD: Right, but.
>
> JANNOTTI: But ya, but.
>
> HARIDOPOLIS: A lot of legitimate, ah, things get bogged down, we don't want to be bogged down.
>
> JANNOTTI: No, I can't see this being bogged down.

A853-54. Wald explained his position:

> WALD: Let me give you a short insight into the Arab mind, that its ah, it's at times difficult to understand now, ah, I can appreciate it because I've had both worlds and I can relate, ah, you know, you folks are here, right, they, they think differently, they deal differently, their psychological process are alien to the way I understand exactly what you're saying. Ok. I'm coming up with something that's going to help the City of Philadelphia. Ah, it would help, as it would help any city. Ah, he does not look on it that way. They do business, differently. They pay the freight up front. They make friends, right, and then when there, there is a potential problem then I don't mean, I don't mean a problem that would necessarily close down construction and throw the project out of Philadelphia.

A855-56.

Wald and Jannotti discussed City Council politics, and Jannotti affirmed Criden's statement that Council "never had a vote on an issue that George and Harry wanted passed that they'd lost in the last two years." A859. They then discussed the payment to Jannotti:

> WALD: But, you were here at the time. You convinced me right off the bat that we were in the right city and we would have no problems.
>
> CRIDEN: You will have no problems.
>
> WALD: And I would just as soon save the money, but I can't go back.
>
> CRIDEN: I understand, we had that discussion.
>
> WALD: (Pointing to Criden) Did he, was he very graphic with ya?
>
> JANNOTTI: Yes.
>
> WALD: On exactly how . . .
>
> JANNOTTI: (Nodding yes) He was always up front, up front.
>
> WALD: Ok and . . .
>
> CRIDEN: To the bottom line, you know me Michael, I, I don't we, we both do everything right up front.
>
> WALD: Ok and, alright, then I'm going to be, then I'm going to be up front with ya. I'm.
>
> CRIDEN: Exactly.
>
> WALD: Ah, you've been in business all your life, you've as you said, you got an education 20 years behind the bar, I was sent to Philadelphia to pay for certain things because that is the psychology and that is the method of business that these people are use to, and that is how they conduct business, they conduct with everybody they do. That's why I'm here. I understand their psychology, I've been involved with them long enough, ah to make it a major part of my life, a majority of my life.

> JANNOTTI: Well, you know ah, just just on the basics, of what you said and what they want to do, it's enough for me to get on the floor and argue. I don't have to, even care what else they want to come up with. My basic point is, the fact that, ah what's coming in here, and this has been our job, to bring as much business and and, and ah tax base and employment to the City of Philadelphia. If that's the way they want to do business, that's all right too.

A859-61. Wald asked again for "assurances":

> WALD: Can I go back, ah ah, to my employer, the Sheik and tell him that I dealt with a man, on Wednesday night tell him who he is, dealt with you, Thursday night, explain who you were, what your position is and say he and I conducted a cash business transaction and he guaranteed me, we don't have a problem in Philadelphia. We ah, ah City Councils on our side the man has the influence with the Finance Committee, he has influence . . .
>
> JANNOTTI: You wouldn't, you wouldn't be able to say we don't have a problem. Problems might arise, but problems ah, you might say problems can be solved.
>
> WALD: Ok, you can handle those problems we presume.
>
> JANNOTTI: I don't see why not if it's a legitimate, if it's a if it's a legitimate if it's a, if it's a legitimate enterprise, it's a legitimate piece of business.
>
> . . . .
>
> WALD: By making friends with you this evening, if we have to go to City Council and say look, ya know, give us a break, right, got us some legislation that this is ok. That it's in the right neighborhood, that the time.
>
> CRIDEN: If you want a street for example let's say changed from a two way to a one way ok, maybe that will help you.

WALD: Ok.
CRIDEN: Handle your traffic pattern.
JANNOTTI: We handle that everyday.

. . . .

WALD: But I go back and I'll say we have this, and I'll use that as an example that if we have a one way street situation and it's just hurting the front, of, of the place we cannot move people in and out of the hotel limousines to private vehicles and what have you, ah the men I dealt with said they will help. I'm not saying that you could walk in there and change this thing tomorrow, but.

CRIDEN: Yet.

JANNOTTI: We'll go in there and battle, we'll go in and battle.

WALD: You're with us?

JANNOTTI: Certainly, we'll go in and battle.

A863-67. Wald then took an envelope from his briefcase [containing $10,000 cash], handed it to Jannotti, and asked if "that amount is sufficient." Jannotti took the envelope, answering, "We've discussed it."

HARIDOPOLIS: You know how much it is?
CRIDEN: Tell him, you can tell him.
HARIDOPOLIS: How much is it?
CRIDEN: Tell him?
JANNOTTI: We won't even discuss it.

WALD: Ok, but you did discuss it with Howard?

JANNOTTI: We won't even discuss it.

HARIDOPOLIS: Is this arrangement please, pleasing to you?

JANNOTTI: As I say, we won't even discuss it.
WALD: Ok, well, we've done our business.

A884-85. Jannotti departed, and Criden promised to see him downstairs.

II.

HOBBS ACT CONSPIRACY

In its opinion granting the motions for acquittal the district court noted that the "evidence permitted, although it did not compel, the inference that the payments represented bribes paid in exchange for the defendants' assurances of using their official positions to pave the way for expeditious completion of the project." 501 F. Supp. at 1184. The court, however, dismissed Count III of the indictment, the Hobbs Act conspiracy count, for two reasons. The first dealt with the fictitious nature of the scheme. Although the court was willing to assume that the "evidence permitted the jury to conclude that, if the project had in fact been a genuine project, it would have required the movement of articles in interstate commerce, and that the payment of these bribes would have affected such commerce by depleting the funds available for carrying out the project,"[8] the court focused on the fact that "there never was any such planned project. The Arabs, their plans, and their money were all entirely fictitious." *Id.* The court concluded:

> While the jurisdictional reach of the Hobbs Act is undoubtedly extensive, touching conduct having only minimal or potential impact upon commerce (broadly defined), it does not operate to confer federal jurisdiction over purely hypothetical potential impacts on commerce which could never occur.

Id. at 1185. The district court thus fashioned a requirement that conviction for conspiracy to violate the Hobbs

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[8] In charging the jury on the Hobbs Act count, the court instructed that it must find that "a natural and probable consequence of the extortion, the receiving the money, would have been to affect interstate commerce" and that the Government position was that the receipt of the payments of $30,000 and $10,000 would have had an effect on interstate commerce. A1344-45.

Act requires an actual potential effect on interstate commerce.

The second jurisdictional defect, according to the district court, stemmed from its view that the Hobbs Act does not cover the "passive acceptance of gratuities by public officials." *Id.* The district court, after noting that defendants did not request payment and "made it very clear that the payments would not be necessary", found that the convictions would represent "a substantial stretching of the definition of extortion." *Id.*

A.

Effect on Interstate Commerce

The broad language of the Hobbs Act, covering anyone who "in any way or degree . . . affects commerce . . . by . . . extortion or attempts or conspires so to do . . .", 18 U.S.C. §1951,[9] demonstrates Congress' intent to free interstate commerce from burdens of any kind caused by extortion. The Supreme Court has expressly recognized that the statute manifests a congressional purpose "to use all the constitutional power Congress has to punish interference with interstate commerce . . . ." *Stirone v. United States*, 361 U.S. 212, 215 (1960). *Accord, e.g., United States v. Cerilli*, 603 F.2d 415, 423 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980). *See also United States v. Culbert*, 435 U.S. 371 (1978); *United States v. Green*, 350 U.S. 415, 420-21 (1956). *In United States v. Staszcuk*, 517 F.2d 53, 58 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975), the court concluded that "the purpose of the Hobbs Act parallels the central purpose of the Commerce Clause itself." Thus, the decision of the district court in this case has application beyond the Hobbs Act because the extent of Congress' power under the commerce clause is implicated, and, if its analysis is accepted, will have ramifications for all federal criminal statutes enacted under Congress' commerce clause power.

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[9] The Hobbs Act reads in pertinent part as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. §1951(a). The statute defines "commerce" as

> commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. §1951(b)(3).

We begin the analysis of Congress' power to regulate interstate commerce with the now-accepted principle that the commerce clause reaches, *inter alia*, activities *affecting* interstate commerce. *Perez v. United States*, 402 U.S. 146, 150 (1971); *United States v. Darby*, 312 U.S. 100 (1941). However, application of a federal criminal statute is not limited to those cases in which an actual interstate effect is shown. Instead, as the Court recognized in *Perez v. United States*, 402 U.S. at 152-53, it is enough that the conduct falls within the "class of activities" within the reach of federal power.

Schwartz and Jannotti were convicted of a conspiracy to violate the Hobbs Act, rather than of a substantive violation of the Hobbs Act. A substantive violation of the Hobbs Act generally is supported by proof of an actual effect on commerce. *See, e.g., United States v. Mazzei*, 521 F.2d 639, 642 (3d Cir.) (en banc), *cert. denied*, 423 U.S. 1014 (1975). *But see United States v. Staszcuk*, 517 F.2d 53, 59-60 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975) (actual effect need not be shown; "realistic probability" of effect is sufficient). Defendants argue that it follows that a prosecution for conspiracy to violate the Hobbs Act also requires proof "that commerce must have been affected." Brief for Appellee Jannotti at 22. In so arguing, defendants overlook the significant distinction between a conviction for a substantive offense and a conviction for a conspiracy to commit the substantive offense. This distinction was recognized by the district court at an early stage of the litigation when it dismissed the substantive Hobbs Act counts of the indictment on the ground that there was no possibility that the bribe payments could actually have affected commerce, but left standing the conspiracy count on the possibility that federal jurisdiction could be grounded on proof that the conspiracy, if completed, would affect commerce. *See* 501 F. Supp. at 1184. The subsequent dismissal of Count III of the indictment was apparently grounded on the district court's changed view of the law that an actual potential effect was required, even for a conspiracy conviction. We believe the district court's earlier view was the correct one.

Because an agreement between two or more persons to commit criminal acts poses, in and of itself, a serious danger to social order, it is proscribed by the law of conspiracy. *See Callanan v. United States*, 364 U.S. 587, 593 (1961). The ultimate failure of the conspiracy may diminish, but does not eliminate, the threat it poses to social order; therefore, the illegality of the agreement does not depend on the achievement of its ends. *See generally United States v. Shoup*, 608 F.2d 950, 957 n.13 (3d Cir. 1979); *United States v. Bobo*, 586 F.2d 355, 371 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). It is similarly irrelevant that the ends of the conspiracy were from the very inception of the agreement objectively unattainable. *United States v. Waldron*, 590 F.2d 33 (1st Cir.), *cert. denied*, 441 U.S. 934 (1979) (conviction for conspiracy to transport stolen goods in excess of $5,000 affirmed, even though, unknown to defendants, property transported was worth less than $5,000); *United States v. Thompson*, 493 F.2d 305 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974) (defendant can be convicted of conspiracy to smuggle marijuana even though substance was not shown to be marijuana). In this case the defendants agreed to do acts which, had they been attainable, would have affected commerce. At that point, regardless of whether an actual effect on commerce was "reasonably probable," a sufficient federal interest was implicated to support federal jurisdiction over that agreement.

The Hobbs Act, by its own terms, encompasses the inchoate offenses of attempt and conspiracy to extort. Convictions for these offenses have been sustained notwithstanding the absence of any evidence of an actual effect on interstate commerce. In *United States v. Rosa*, 560 F.2d 149, 153 (3d Cir.) (en banc), *cert. denied*, 434 U.S. 862 (1977), a case in which there was no effect on commerce because the "victim" refused to pay the extortion demand, we stated that a defendant may be convicted under the Hobbs Act for an "attempted extortion which would, if the act were completed, have the effect of obstructing commerce." *See also United States v. Bellomini*, 454 F. Supp 44, 47 (W.D. Pa. 1978) ("The fact that the business enterprise was frustrated at a later date through failure of finances does not constitute a defense to a charge of attempt to extort money in violation of the Hobbs Act."). Similarly, in *United States v. Caci*, 401 F.2d 664 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969), the Second Circuit sustained the conviction of defendants for conspiracy to rob an armored car messenger in violation of the Hobbs Act although the plan was aborted.

Counsel for defendants conceded at oral argument that they could point to no precedent to support their contention that a conviction for conspiracy to violate the Hobbs Act must be predicated on a showing of an actual or probable future effect on interstate commerce. One of the few cases to focus on the interstate commerce aspect of the Hobbs Act, *United States v. Staszcuk*, 517 F.2d 53 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975), arose when a local alderman was convicted of a substantive Hobbs Act violation. The government had proven that he received $3,000 and that he did not oppose a zoning change which authorized the construction of an animal hospital. Because no such hospital was ever built, the court noted that "there is no evidence that either the zoning change or the payment had any effect whatsoever, either favorable or unfavorable, on interstate commerce." *Id.* at 55. Judge, now Justice, Stevens, writing for a majority of the en banc court, considered whether the federal statute reached extortion under those circumstances, and concluded: "We are . . . persuaded that the cases which uniformly hold *that a threatened effect on interstate commerce is sufficient to bring the statute* into play notwithstanding the absence of any actual effect, correctly interpret the congressional purpose." *Id.* at 59 (emphasis added).

We believe Justice Stevens' approach is dispositive of the jurisdictional issue before us. Congress can constitutionally reach inchoate offenses because these offenses pose a potential threat to interstate commerce; the existence of such a threat ties "the proscribed conduct to the area of federal concern delineated by the statute." *United States v. Feola*, 420 U.S. 671, 695 (1975). The appropriate inquiry then is not whether the defendants' perceptions can invest the courts with federal jurisdiction, as the district court viewed the issue, but whether the defendants' conduct constituted a sufficient threat to interstate commerce so as to implicate an "area of federal concern" sufficient to give rise to federal jurisdiction.

In essence the defendants are arguing that we should accept an impossibility defense when federal jurisdiction is predicated on interstate commerce. We believe such a defense must be rejected here. In substantive Hobbs Act convictions, the requisite nexus to interstate commerce has been found in the depletion of assets theory, because the payment of an extortion demand may reduce the assets available for the purchase of goods originating in other states. *See, e.g., United States v. Cerilli,* 603 F.2d 415, 424 (3d Cir. 1979), *cert. denied,* 444 U.S. 1043 (1980); *United States. v. Addonizio,* 451 F.2d 49, 77 (3d Cir. 1971), *cert denied.,* 405 U.S. 936 (1972). In *United States v. Rindone,* 631 F.2d 491 (7th Cir. 1980), the Hobbs Act conviction of a municipal inspector who had extorted money in exchange for work permits was challenged on the ground that there was no nexus with interstate commerce under the depletion of assets theory because the Federal Bureau of Investigation had supplied the money used in the extortionate transaction. In rejecting this claim, the court reviewed Hobbs Act cases which upheld jurisdiction although no depletion of assets affecting interstate commerce had or could take place and affirmed the "federal interest in deterring even futile threats to interstate commerce", 631 F.2d at 493, referring to *United States v. Staszcuk,* 517 F.2d at 57. The *Rindone* court concluded:

> As the court noted in [*United States v. Brooklier,* 459 F. Supp. 476 (C.D.Cal. 1978)], "[t]his extortion completed a plan that would have actually affected commerce but for a fact unknown to defendants, *i.e.,* that [the victim] was a company not actually engaged in commerce." *Id.* at 478. The presence here of a fact not known to Rindone, *i.e.,* that the FBI provided the payoff money, is likewise irrelevant to the jurisdictional inquiry.

631 F.2d at 494. In the *Brooklier* case, relied upon by the Seventh Circuit, the victim corporation was an F.B.I.-created shell that in fact had no interstate deal-

ings. Jurisdiction under the Hobbs Act was nonetheless upheld.

In construing other federal statutes, the courts also have expressed an unwillingness to accept impossibility as precluding jurisdiction. In *United States v. Rose*, 590 F.2d 232 (7th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979), two defendants who had agreed to burglarize a home in Arizona and to transport the stolen goods to Illinois, unwittingly engaged F.B.I. agents to perform the theft and to transport the goods. The agents never intended to commit the thefts and no goods were ever stolen; instead the defendants were arrested and convicted of conspiracy to transport goods interstate knowing the goods to be stolen. Although the issue of federal jurisdiction was not expressly raised, the court, in affirming the convictions under 18 U.S.C. §§371, 2314, commented:

> Here [defendants] intended to cause the goods to be stolen and then transported in interstate commerce with knowledge that they had been stolen. All that was necessary, in addition to an overt act, was that the intended future conduct they had agreed upon include all the elements of the substantive crime.

590 F.2d at 235. This statement reflects the court's view that the defendants' plan to transport the goods interstate, even though unattainable from the outset, sufficiently impinged on an area of federal concern to justify federal regulation and prohibition. *See also Craven v. United States*, 22 F.2d 605, 609 (1st Cir. 1927), *cert. denied*, 276 U.S. 627 (1928) (conviction for conspiracy to import foreign liquor without payment of tariff can be sustained based on defendants' erroneous beliefs that liquor was of foreign origin).

Defendants have argued that the holding in *United States v. Feola*, 420 U.S. at 695-96, supports their view that an essential jurisdictional element cannot be established by reference solely to the state of mind of the defendant. *Feola* provides no support for the defendants' theory. In *Feola,* even though the defendants did not intend to assault a federal officer, the Court held that they could be still convicted for conspiring to violate the federal statute, 18 U.S.C. §111, which prohibits an assault on a federal officer. In holding that there was a "sufficient threat" to an "area of federal concern" to meet the federal jurisdictional requirement as long as a federal officer was in fact the target of the planned attack, 420 U.S. at 695, the Court did not preclude the existence of federal jurisdiction where the intended victim is believed to be a federal officer, but in fact is not.

In fact, the language in the *Feola* opinion and the approach taken by the Court there support our final reason for rejecting the district court's holding that an actual potential effect on interstate commerce is a jurisdictional prerequisite for a conviction for conspiracy to violate the Hobbs Act. Defendants have been able to offer this court no policy reason for us to accept their restrictive view of Congress' constitutional power to legislate as to conspiracies which pose a threat to interstate commerce. Defendants agree that had the government moved from the verbal ruse that its agents were in the hotel construction business to the more concrete action of embarking on that venture, *see United States v. Gambino,* 566 F.2d 414 (2d Cir. 1977), *cert. denied,* 435 U.S. 952 (1978), the jurisdictional requirement would have been met. However, we see no reason to interpret Congress' legislative power as dependent upon whether the F.B.I. agents actually contract for a hotel site, purchase machinery to dump garbage, or establish their own fencing operation for the purchase of stolen goods. To require that the government take that additional step before it can constitutionally reach a proven conspiracy which would have affected interstate commerce had the facts been as represented misdirects the focus of the conspiracy cases. As the Court noted in *Feola,* "[T]he law of conspiracy serves ends different from, and complementary to, those served by criminal prohibitions of the substantive offense." 420 U.S. at 693. The Court identified the dual purposes of conspiracy law, "protection of society from the dangers of concerted criminal activity," and sanctions against those agreements which pose great likelihood of commission of an act due to well formed criminal intent. *Id.* at 693-94.

In this case the jury found that the defendants conspired to violate the Hobbs Act by their acceptance of payments in return for their promises to expedite completion of an elaborate hotel project which, had it been constructed, would have entailed at least a $30 million expenditure. Had the project actually been planned as represented, defendants' actions would have violated the Hobbs Act even if unforeseen difficulties, such as the overthrow of the "sheik", prevented any further action on the project. The federal interest in protecting interstate commerce is no less under the factual situation presented in this case. The threat posed by defendants' actions is just as great. Since Congress has exercised the full scope of its commerce power in the Hobbs Act, we conclude that there was Hobbs Act jurisdiction.

B.

Extortion "Under Color of Official Right"

As an additional ground for dismissing the Hobbs Act count the district court held that defendants' conduct did not constitute "extortion" under the Act because they, at most, "passive[ly]" accepted the bribes. 501 F. Supp. at 1185. The Act defines "extortion" as:

> the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. §1951(b)(2).

The district court's holding is inconsistent with the rationale underlying the holdings of this court that the Act is disjunctive and proscribes the "obtaining of property from another . . . under color of official right," without proof of coercion by the defendant. *United States v. Kenny*, 462 F.2d 1205, 1229 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972). We reaffirmed this principle in *United States v. Mazzei*, 521 F.2d 639 (3d Cir.) (en banc), *cert. denied*, 423 U.S. 1014 (1975), where we stated:

> A violation of the statute may be made out by showing that a public official through the wrongful use of office obtains property not due him or his office, even though his acts are not accompanied by the use of "force, violence or fear."

Id. at 645 (citations omitted). In *Mazzei*, we observed that "the 'under color of official right' language [of the Hobbs Act] 'repeats the common law definition of extortion.' " *Id.* (citation omitted). At common law, extortion was defined as "any officer's unlawfully taking, by color of his office, from any man, any money or thing of value that is not due to him." 4 W. Blackstone, *Commentaries* *141. The requirement that the money be taken "by color of his office" meant "simply that the officer must have taken money not due him for the performance of his official duties." *State v. Weleck*, 10 N.J. 355, 372, 91 A.2d 751, 759 (1952). Thus, "[i]f the [Hobbs] Act is read in full, the distinction between bribery and extortion becomes unnecessary where public officials are involved." Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 Seton Hall L. Rev. 1, 14 (1971). More recently, in *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), we upheld the conviction of state officials who received bribes in return for conferring valuable state contracts, and approved the district court's charge that extortion under "[c]olor of official right is defined as the taking by a public official of money not due him or his office . . . ."

The holding in our cases that the Hobbs Act covers the acceptance of bribes by public officials even when payment was not obtained by force, threats, or use of fear, and the further suggestion that there need be no inducement or prior request for such payments, accords with the view taken by other courts of appeals. In *United States v. Hedman*, 630 F.2d 1184 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), the government proved at trial that defendants, city building inspectors, accepted money from builders who failed to conform with the building code, but no solicitation of the bribes was shown. In rejecting defendants' argument that the government must show that the officials were the "initiators" or "inducers" of the alleged payments, the court stated:

> It is settled law in this Circuit as well as others that in a Hobbs Act prosecution for extortion under color of official right it is unnecessary to show that the defendant induced the extortionate payment. . . . The Government is merely required to prove that a public official obtained money to which he was not entitled and which he obtained only because of his official position.

Id. at 1195 (footnote omitted). The Sixth Circuit has also held that the "technical overdrawn distinction" which the public officials sought to make there between bribery and extortion under the Hobbs Act is not in keeping with the legislative intent, and that "in cases of misuse of official power, bribery and extortion are not mutually exclusive." *United States v. Butler*, 618 F.2d 411, 417 (6th Cir. 1980), *cert. denied*, 447 U.S. 927 (1980) and 449 U.S. 1089 (1981).

Defendants argue that in each of the cases in which this court seemed to interpret the Hobbs Act to cover passive acceptance of a bribe by a public official, the defendant had in fact engaged in some conduct which could be construed as inducement of the payment. Even if the Hobbs Act were to be construed as requiring some inducement on the part of the public official, defendants' conduct in this case hardly constituted merely passive acceptance of the payments. The evidence does not fit the defendants' posited illustration of an unexpected bribe mailed to a public official's office. On the contrary, rather than remaining in their own offices, the evidence shows that each defendant arrived at the Barclay suite after having been briefed about the purported hotel project, the fact that there would be a payment made, and the specific amount of the payment which would be made to each. Although there is no verbatim record of Criden's earlier conversation with Schwartz, Criden reported to Wald that he told Jannotti before the January 24th meeting that the hotel builders wished assurances that there would be no municipally imposed obstacles to the project, and that the builders were willing to pay for such assurances. A897. As soon as each defendant was in the Barclay suite, Wald, the F.B.I. agent, promptly repeated the need for such assurances. Thereafter, Schwartz launched into a discourse on his own importance and power and his ability to control City Council and the relevant municipal officials and departments, A692-96, 709-13, *see* pages 13-16 *supra*, and Jannotti also confirmed his own power. A858-59, *see* page 21 *supra*. Further, each gave assurances that there would be no obstacles or that the obstacles, if any, would be manageable. Thus, each defendant's appearance at the Barclay in expectation of a payment and his conduct in providing such assurances evidences more than mere "passive" acceptance of the bribes,[10] and falls within the

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[10] The district court's statement, without citation to the record, that the evidence "clearly" establishes that the defendants

Hobbs Act definition of extortion under color of official right.

Accordingly we hold that the district court erred in dismissing Count III of the indictment.

III.

ENTRAPMENT

As Justice Harlan noted, the meaning, purpose, and application of the defense of entrapment in criminal cases are problems that have sharply divided the Court. *See Lopez v. United States*, 373 U.S. 427, 434 (1963). *See also United States v. Russell*, 411 U.S. 423, 439-40 (Stewart, J., dissenting) (1973). To a large extent, that division has centered on whether the controlling standard focuses on the conduct of the government (the objective test) or the predisposition of the defendant (the subjective test). The legal principles which determine the application of the entrapment defense in this case, however, are not in serious dispute. The parameters of the entrapment defense are largely to be found from the four principal cases in which the defense has been considered by the Supreme Court, *Sorrells v. United States*, 287 U.S. 435 (1932); *Sherman v. United States*, 356 U.S. 369 (1958); *United States v. Russell*, 411 U.S. 423 (1973); and *Hampton v. United States*, 425 U.S. 484 (1976).

In *Sorrells v. United States*, where the Court first recognized the defense of entrapment, the Court held the defendant was entitled to have the jury consider

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"made it very clear that the payments would not be necessary," 501 F. Supp. at 1185, does not fairly represent the only possible construction of the evidence, and the jury accepted a contrary construction. The district court's statement is also inconsistent with the court's own finding that the evidence permitted the inference that the payments were "in exchange for the defendants' assurances of using their official positions to pave the way for expeditious completion of the project." 501 F. Supp. at 1184.

whether his acts of possessing and selling one-half gallon of whiskey in violation of the National Prohibition Act were instigated by the prohibition agent who implanted in the "mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that [Government officials] may prosecute." 287 U.S. at 442. The nature of the defense was outlined more fully when the Court next considered the defense a quarter of a century later in *Sherman v. United States*. Chief Justice Warren, writing for the majority of the Court, stated that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." 356 U.S. at 372. In concluding that entrapment had been established as a matter of law, the Court determined from the undisputed testimony of the prosecution's witnesses that the defendant was induced to sell narcotics by the government informer and that he was not predisposed, *i.e.*, that he engaged in conduct he would not otherwise have attempted. The Court noted, "Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials." *Id.* (emphasis in original).

In *United States v. Russell*, the Court expressly disapproved of the decisions of the lower federal courts which had expanded the entrapment defense beyond the Court's opinions in *Sorrells* and *Sherman*. Instead, the Court reiterated that the defense was not of constitutional dimension, and reaffirmed its prior opinions that established that entrapment is a "relatively limited defense", 411 U.S. at 435, which cannot be used by a predisposed defendant. Most recently, in *Hampton v. United States*, a majority of the Court, in two separate opinions, upheld defendant's conviction arising from his sales of heroin which had allegedly been procured from a government informant, reaffirming once again the unavailability of the entrapment defense to a predisposed defendant.

Emerging from these cases are the principles which guide our review of the evidence which defendants argue and the district court found established entrapment as a matter of law. As the Court stated in *Sorrells*, "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." 287 U.S. at 441. Entrapment occurs when a defendant who was not predisposed to commit the crime does so as a result of the government's inducement. The entrapment defense thus focuses on "the intent or predisposition of the defendant to commit the crime." *United States v. Russell*, 411 U.S. at 429. As we have previously held, the government has the burden "to disprove the whole [entrapment] defense beyond a reasonable doubt," *United States v. Watson*, 489 F.2d 504, 510 (3d Cir. 1973).[11]

Finally, although there may be instances where the undisputed facts establish the entrapment defense as a matter of law, as in *United States v. Sherman*, or where the evidence is simply insufficient to submit the issue to the jury, *see, e.g.*, *United States v. Armocida*, 515 F.2d 49, 55-56 (3d Cir. 1975); *United States v. Payseur*, 501 F.2d 966, 970-71 (9th Cir. 1974); *United States v. Smith*, 489 F.2d 1330, 1334-35 (7th Cir. 1973), *cert. denied*, 416 U.S. 994 (1974), entrapment is generally a jury question. *See United States v. Lentz*, 624 F.2d 1280, 1286 (5th Cir. 1980), *cert. denied*, 450 U.S. 995 (1981); *United States v. Bocra*, 623 F.2d 281, 288-89 (3d Cir.), *cert. denied*, 449 U.S. 875 (1980); *United States v. Twigg*, 588 F.2d 373, 376 (3d Cir. 1978). *See also United States v. Klosterman*, 248 F.2d 191, 194-95

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[11] *See* discussion of burden of proof in Murchison, *The Entrapment Defense in Federal Courts: Modern Developments*, 47 Miss. L.J. 573, 604-06 (1976).

(3d Cir. 1957); *Tzimopoulos v. United States*, 554 F.2d 1216, 1217 (1st Cir.) (per curiam), *cert. denied*, 434 U.S. 851 (1977). This court has held that a defendant is entitled to an entrapment instruction,

> however unreasonable the judge would consider a verdict in favor of the defendant to be, when the accused shows (1) evidence that the Government initiated the crime, regardless of the amount of pressure applied to the defendant, and (2) any evidence negating the defendant's propensity to commit the crime.

United States v. Watson, 489 F.2d at 509.

The district court in this case submitted the issue of entrapment to the jury following a jury charge on that issue which is not here challenged. After the jury decided that defendants were not entrapped, the district court reconsidered the propriety of such submission in ruling on defendants' motions for acquittal. The court summarized the government's evidence as relying exclusively upon the fact that each defendant did accept money from the agents. The district court agreed that "[i]n some situations . . . a defendant's ready acquiescence in the Government's suggestion may be enough to justify a finding of predisposition." *United States v. Jannotti*, 501 F. Supp. at 1200. *See, e.g.*, *United States v. Valencia*, 645 F.2d 1158, 1167-68 (2d Cir. 1980) (ready response to drug sale proposal); *United States v. Viviano*, 437 F.2d 295, 299 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971) (ready response to bribe solicitation).

However, the district court overturned the jury's decision. Although the court remarked that, "No-one who has viewed the videotape evidence in this case could avoid feelings of distress and disgust at the crass behavior the tapes reveal," it gave judgment for the defendants because "[t]he evidence was, as a matter of law, insufficient to establish the defendants' predisposition beyond a reasonable doubt." 501 F. Supp. at 1200. In support of that decision, the district court relied on three factors.

> In my opinion, in their zeal to make sure that the defendants would accept the tendered payments, the government agents offered such *attractive inducements as to preclude any reliance upon the defendants' acceptance* of the money as proof of predisposition. In the first place, the amounts offered were *exceedingly generous*. Standing alone, the very amounts of the bribes were, to paraphrase the language of the court in *Scriber v. U.S.*, [4 F.2d 97 (6th Cir. 1925)], "a substantial temptation to a first offense."
>
> In the second place, it was clear that the *defendants would not be asked or expected to do anything improper on behalf of the proposed hotel venture*; and they agreed to do nothing inconsistent with their obligations as members of the City Council, working for the benefit of their constituents.
>
> Finally, and most importantly, they were led *to believe that if they did not accept the money, the project would not come to Philadelphia*. In the context of the fiscal crises which beset all large cities these days, and in the context of the problems of urban blight and decay, the governmental inducement in this case was indeed calculated to overwhelm.

Id. (emphasis added).

Before turning to that evidence, it will be useful to reiterate briefly the applicable principles governing deference to the jury's findings. In ruling on a motion to overturn a jury's finding of predisposition the trial court must view the evidence in the light most favorable to the prosecution, and resolve all reasonable inferences therefrom in its favor. *See Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Artuso*, 618 F.2d 192, 195-96 (2d Cir.), *cert. denied*, 449 U.S. 861 (1980).

Credibility determinations are for the jury. *See, e.g., United States v. Bocra*, 623 F.2d 281, 289 (3d Cir.), *cert. denied*, 449 U.S. 875 (1980). Viewing the evidence in this light, the trial court must uphold the jury's verdict unless no reasonable jury could conclude beyond a reasonable doubt that the defendant was predisposed to commit the offense for which he was convicted. *See Burks v. United States*, 437 U.S. 1, 16 (1978). Obviously, in reviewing a district court's decision to disregard a jury verdict, we apply the same standard. *Id.* at 17; *United States v. Dixon*, 658 F.2d 181, 188 (3d Cir. 1981). Thus, we must independently examine the evidence on the three factors relied upon by the district court to determine whether it was as overwhelming for the defendants as the district court found. If not, it was error to withdraw the decision on the predisposition issue from the jury.

A.

The size of the payments

The undisputed evidence shows that Schwartz, chairman of Philadelphia City Council, accepted a payment *in cash* of $30,000 from an F.B.I. agent posing as a representative of the sheik, that he looked inside the envelope, fingered the bills, and licked the envelope closed. The evidence also shows that Jannotti, a member of Philadelphia City Council, accepted a payment in cash of $10,000 from the same F.B.I. representative, that he placed the envelope in his pocket without opening it, and that he declined to discuss the amount of the payment, repeating several times "We won't even discuss it."

The district court, without any reference to the record or any analysis of the issue, characterized the amounts offered as "exceedingly generous" and determined that "the very amounts of the bribes were . . . 'a substantial temptation to a first offense.' " 501 F. Supp.

at 1200. In effect, the district court held that no reasonable jury could have found predisposition from the defendants' on-tape conduct because of the nature of the inducement offered to the defendants.

Even if the dollar amount offered were relevant to disprove predisposition, a question which we do not decide, we find nothing in the record to support the district court's conclusion that in today's inflationary times, city councilmen would view sums of $30,000 or $10,000 as so large or generous as to overcome an official's natural reluctance to accept a bribe. Certainly, the question of the generosity of the sums given must be viewed in relationship to the circumstances of the acceptors. What would be tempting to an office clerk would plainly not be enough to tempt a millionaire. Yet the record is almost bare of any evidence of the defendants' financial situations. What the record does disclose hardly suggests that either man was in dire straits financially. Schwartz was a practicing lawyer until 1970 or 1971 and, until that time, a partner of a large and active center city Philadelphia law firm. In his discussion with Wald, Schwartz stated:

> SCHWARTZ: And, uh, I was a senior partner in a very large law firm, but decided to give up the practice completely and sever my connections with the firm to devote full time to my councilmatic duties. I felt that, uh, it was the proper thing for me to do, for my own discretion. The then mayor, who is now out of office, Frank Rizzo, who was the former police commissioner. And, uh, you know, you think things out.
>
> WALD: Uh-hmm.
>
> SCHWARTZ: And fortunately, I didn't have to worry about earning a livelihood, I've, I've been a real estate lawyer, corporate practice real estate, administrative agency law. . . .

A694-95. Furthermore, Schwartz did not expect to keep the entire $30,000. As the district court found,

> However, Schwartz accompanied Criden to a meeting with the undercover agents on January 23, 1980, and the videotape of that meeting, together with other evidence, demonstrates that Schwartz knew he would be paid $30,000, and that the payment would be shared in some way with Criden.

501 F. Supp. at 1198.

Jannotti, who in addition to his City Council salary also owned a bar, made a statement to an F.B.I. agent during the subsequent investigation that his bar made "more than $10,000 and there would be no reason for him to take that kind of money." A925.

In *United States v. Myers*, Nos. CR80-00249, CR80-00253, CR80-00291, slip op. at 59 (E.D.N.Y. July 24, 1981), the district court was faced with a similar issue and commented that today "$50,000 is simply not an overpowering sum of money." It also noted that other legislators approached with bribes of sums greater than $30,000 found themselves capable of rejecting the offers. *Id.* at 53, 60.

The jury was well aware of the amount of the bribes as well as the defendants' stations in life. Since there is nothing in the record to support the district court's conclusion that the amounts involved were, *as a matter of law*, so generous and enticing as to overcome any possible refusal by the defendants, the court's action in overturning the jury's resolution of this issue was plainly an intrusion on the jury's prerogative.

B.

The "benignity" of the payments

The second of the three factors which the district court stressed in holding that the evidence was insufficient as a matter of law to establish that the defendants' acceptance of the money showed their predisposition was that "the defendants would not be asked or expected to do anything improper on behalf of the proposed hotel venture" and that "they agreed to do nothing inconsistent with their obligations as members of the City Council, working for the benefit of their constituents." 501 F. Supp. at 1200. The district court stated that "there was no suggestion that the putative sheik required or expected any violation of the law in exchange for the payment: he merely wished to be assured that he had 'friends' in high places." *Id.* at 1194.

There is a fundamental inconsistency in the district court's view of the evidence in this part of its opinion and the court's earlier statement in the same opinion that

> [t]here is no dispute about the defendants' receipt of the payments, and *the evidence permitted*, although it did not compel, *the inference that the payments represented bribes paid in exchange for the defendants' assurances of using their official positions to pave the way for expeditious completion of the project*.

501 F. Supp. at 1184 (emphasis added). The district court never attempted to reconcile the two statements. It may be that the district court, in stating that defendants agreed to do nothing "improper", was referring to the defendants' repeated statements on tape that they assumed that the hotel was to be a legitimate venture and their frequent comments that the project would be good for Philadelphia. However, as the district court acknowledged, the evidence permitted the inference that the payments represented "bribes" to elected public officials in return for the use of their official positions. We fail to see how any court anywhere under any circumstances can fail to characterize a public official's acceptance of payment to "pave the way for expeditious completion of the project" as "improper".

The government argues that defendants' arrival at the hotel room after 10 o'clock in the evening to meet with total strangers, and the statements of Criden and Johanson indicating that Schwartz and Jannotti would be ready and willing to accept payments in return for political favors and that they had done so in the past, *see, e.g.*, A497-500, support the jury's determination that the defendants were predisposed. However, even if we were to look only at the defendants' own statements and actions shown on the tapes, there is no justification for taking from the jury the question of the nature of defendants' undertaking.

To recapitulate some of the relevant evidence, early in the meeting at the Barclay Hotel between Schwartz, Wald and Criden, Wald made it clear that he was seeking political favors in connection with the hotel venture. Thus, whatever Schwartz' expectations actually were about the services he was to perform for the anticipated fee following Judge Shiomos' references to a "consulting opinion", a reasonable jury could have found that in the course of Schwartz' meeting at the Barclay it became clear that what was at stake was the exchange of future political favors by the President of Philadelphia's City Council for cash to be paid on the spot. See pp. 12-17 *supra*.

Furthermore, in light of Schwartz' response to Wald's overture ("we got five or six [city council] members that came in . . . you tell me your birth date. I'll give them to you for your birthday," A695-6), a reasonable jury could find that Schwartz quickly dispelled any notion that he thought he was meeting Wald for legitimate "consulting" work. City Council members are simply not "given" as birthday gifts to prospective enterpreneurs as part of a "consultation."

The evidence as to Jannotti, if not quite as strong as that against Schwartz, also could be construed by a reasonable jury as proving that the payment was made for political support, for Jannotti's vote, thereby belying any suggestion that it was made for "friendship". With Jannotti as with Schwartz, Wald explained "I'm only here for one reason, to bring back some assurances." A849, and characterized the understanding between them as a "cash business transaction" in which Jannotti "guaranteed . . . that we don't have a problem in Philadelphia. . . ." A863. A reasonable jury could view the assurances given by Jannotti as his willingness to commit his City Council vote, A853-54, and to use his political influence. A863-67. See pp. 19-24 *supra*.

The district court stressed the concern expressed by both Schwartz and Jannotti that the project be "legal" and "legitimate". As the evidence shows, Schwartz expressed concern that the hotel was not to be used for immoral purposes, and Jannotti was concerned that the hotel was not to be used for gambling. While the defendants' statements may indicate their unwillingness to support the project if it were to be used for such illegal purposes, either because they were interested in Philadelphia's welfare or because such use would become a matter of public knowledge, they fail to negate the permissible inference that both men knew they were acting improperly in accepting money in return for their support and influence. As this court has previously held, it is neither material nor a defense to bribery that "had there been no bribe, the [public official] might, on the available data, lawfully and properly have made the very recommendation that [the briber] wanted him to make." *United States v. Labovitz*, 251 F.2d 393, 394 (3d Cir. 1958). Judge Hastie, writing for the court, set forth the rationale for that holding:

> It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased judgment on the part of those who participate in the making of official decisions. Therefore, society deals sternly with bribery which

> would substitute the will of an interested person for the judgment of a public official as the controlling factor in official decision.

Id.

The district court, in discussing some of the evidence, stated that Schwartz' words and actions during the meeting, as disclosed on the videotape, could be interpreted to mean either "that he was rendering legal advice and advice as an expert on city government and real estate development, in exchange for a consulting fee" which would "merely" violate the City Charter' prohibition against conflicts of interest, or "that he was accepting a bribe for assuring his official support of a project he would have been willing to support in any event." *Id.* at 1198.

In the posture of the case before us, we cannot accept the "consulting fee" view of the payment to Schwartz (no similar contention having been made as to Jannotti). It has often been stated by this court that a defendant who chooses to defend on the ground of entrapment must admit that there were present all the elements of the crime with which he or she was charged. *United States v. Shoup*, 608 F.2d 950, 964 (3d Cir. 1979); *United States v. Levin*, 606 F.2d 47, 48-49 (3d Cir. 1979) (per curiam); *United States v. Watson*, 489 F.2d 504, 507 (3d Cir. 1973). The district court adopted a restrictive view of the holdings in these cases by interpreting them as conditioning the entrapment charge on defendants' admission only of the operative facts. 501 F. Supp. at 1201. Subsequent to the district court's opinion, we considered whether an entrapment defense required admission of the relevant *mens rea* and stated that the entrapment defense "requires admission of guilt of the crime charged and all of its elements, including the required mental state." *United States v. Hill*, 655 F.2d 512, 514 (3d Cir. 1981). Thus, our precedent suggests that since acceptance of a bribe was an element of the crime with which Schwartz was charged. Schwartz was required to forego the argument that receipt of the money was a benign "consulting fee" if he was to rely on the entrapment defense. *But see United States v. Demma*, 523 F.2d 981 (9th Cir. 1975) (en banc).

The other difficulty in the willingness of the district court to view the payments as benign is the obvious substitution of its view for that of the jury. As the district court recognized, the jury accepted the view that the payments were not "consulting fees" but were bribes. 501 F. Supp. at 1198-99. The jury was expressly instructed that it must determine whether each defendant understood that the money was being paid to influence his vote or conduct. The court charged:

> You would ask yourselves at the conclusion of the transaction and in the totality of the circumstances: Did that particular defendant understand that money was being paid to him to influence his vote, to influence his conduct in his official position or was this a situation in which the defendant understood merely that the money was to be paid in order to enable the Sheik's representative to report back to the Sheik that he had made friends in accordance with the Arab way of doing business? That is, in the totality of the circumstances, both the defendant and the Arab representatives understood that the defendant had been bought and that his support or at least assurance of continuing support were based at least in part upon the fact that he had received the money or was this a situation in which it was understood between the representative and the defendant that there was no corruption involved, that this was simply something which was made necessary in order to encourage the Sheik to go ahead with the project but that as between the representatives and the councilmen it was understood that there was no corruption involved?

A1358-59. In view of the jury's adverse determination that the payments were not for "friendship" but were to improperly influence defendants in the exercise of their official positions, the district court's substitution of its view of the evidence in deciding that *as a matter of law* there could be no predisposition represented an unfortunate usurpation of the jury's prerogative.

C.

The "contingency" of the hotel project, i.e., "the Arab mind"

The final factor, and the one considered "most important" by the district court in its assessment of the "overwhelm[ing]" inducement offered by the F.B.I. agents posing as the sheik's representatives, was the fact, as described by the district court, that defendants were "led to believe that if they did not accept the money, the project would not come to Philadelphia." 501 F. Supp. at 1200. The district court, in reviewing the entire undercover operation which has come to be known as ABSCAM, stated: "Perhaps the crucial aspect of the undercover operation was its emphasis upon 'the Arab mind,' the 'Arab way of doing business.' A constant theme of *the agents' representations was that their principals would not undertake any project unless first assured of the 'friendship' of the persons* with whom they were dealing." *Id.* at 1194 (emphasis added).

This conclusion suffers from the failure to cite to evidence that any such representation was ever made to or communicated to defendant Schwartz. We have found no such evidence. In fact, early in the meeting between Schwartz and Wald, Schwartz was told that Philadelphia had already been selected:

> WALD: Well, what I have been instructed to do and the purpose for ah my visits to Philadelphia is to firm up uh, what we consider to be a major invest-

> ment here and uh the gentleman cares to make a major investment here because he seems to like Philadelphia, and he has been told that it would uh be in his best interest to have an investment, uh, in an area where he, uh, would like to take up rather permanent residence and Philadelphia is it.

A690.

In an effort to point to evidence which would support the district court's conclusion that Schwartz was led to believe that if defendants did not accept the money the project would not come to Philadelphia, Schwartz refers to statements by Wald that his employer was interested in Philadelphia, had to be "happy", wanted to "take care of any potential problems long before they exist" and remarks regarding the need for "assurances." Schwartz has not, nor have we, found any statement in which Wald made the representation to Schwartz that the project was contingent on his acceptance of the money. While Wald may have made representations to others that the hotel project was contingent, we have not been referred to any evidence that such statements were communicated to Schwartz. If Criden were supposed to be the alleged conduit, he failed to testify to that effect since, notwithstanding the grant of defense immunity to Criden, neither the defendants nor the government called him as a witness.[12]

It may be that the district court, aware of similar representations with regard to the "Arab mind" which were made to other ABSCAM participants, interpolated them as to Schwartz. Whatever the explanation, since this was the "most important" factor to show that the appeal to civic duty was too overwhelming an inducement for any public official to resist, once this factor is negated, the house of cards built upon it collapses.

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[12] Prior to trial, the district court stated that the content of the defendants' off-camera discussions with Criden was of critical importance to defendants' entrapment defense. A102. After the close of the government's case-in-chief, the court granted Criden defense immunity to permit him to testify about these conversations. A996-1003.

With regard to Jannotti, there is no question that a reference to the "Arab mind" was made to him, and that Wald also represented that this "is the method of business that these people are use [sic] to, and that is how they conduct business . . . ." A860. See pp. 21-22 *supra*. Whether these statements can be construed as a representation that only if Jannotti accepted the money would the hotel come to Philadelphia is somewhat questionable. Such a conclusion is even more equivocal in light of the following colloquy which took place before the reference to the "Arab mind":

> JANNOTTI: Who could refuse a project like that?
>
> WALD: Nobody could, that's my point, alright, *but I've been told the City of Philadelphia is where this, ah, this construction project is going. I mean this is where he is going to be. This is where he wants it . . . .*

A852 (emphasis added). Later in the meeting Wald reiterated that "Philadelphia has already been sold, to the man." A876. *See also* A864, A880. Thus, even as to Jannotti, at most the evidence presents the basis for differing arguments to the jury as to the interpretation to be placed on the conversations.

In fact, the issue was presented to the jury. The district court instructed on this precise issue as follows:

> . . . depending on how you interpret the testimony, you might draw the inference that the net effect of the totality of the circumstances considering everything that the agents said in the course of these meetings the defendants were led to believe that unless they were willing to accept money and give assurances this hotel project would not be coming

> into Philadelphia . . . . [D]epending upon how you interpret what was said you could draw either conclusion, and it is up to you to decide which one is appropriate . . . .

A1355-56. The decision of the jury, adverse to the defendants, demonstrates its resolution of the differing inferences which might be drawn.

D.

Acceptance of the money by Schwartz and Jannotti

To summarize, the district court found that the acceptance of the money by Schwartz and Jannotti was insufficient evidence of their predisposition to take bribes because the government offered "such attractive inducements" as were bound to overwhelm. 501 F. Supp. at 1200. We conclude that the jury could have found that the evidence fails to show "such attractive inducements" as would overwhelm most honest, responsible public officials, no matter how deep-seated their civic duty. Thus, we return to the initial proposition, that the acceptance of the money itself may be sufficient to show predisposition.

In certain types of crimes, it is often possible for the government to show predisposition by proof of the defendant's prior convictions or his or her participation in similar transactions. *See, e.g., United States v. Ordner*, 554 F.2d 24, 28 (2d Cir.), *cert. denied*, 434 U.S. 824 (1977); *United States v. Lemons*, 470 F.2d 135 (3d Cir. 1972) (per curiam), *cert. denied*, 412 U.S. 929 (1973). Such evidence would be extremely difficult to produce in the case of acceptance of a bribe by a public official. Because such officials are often intelligent, educated and worldly, it is unlikely that they will accept money from those to whom they have not had "safe" introductions and who, because they are also implicated, are unlikely to report to the authorities. In addition, because the crime has no direct victim, its occurrence leaves no public trail which cries for investigation. Since the ultimate factual determination is whether the defendant was "ready and willing to commit the crime if an opportunity should be presented," as distinguished from having been "corrupted by some overreaching or special inducement," *United States v. Watson*, 489 F.2d 504, 509 (3d Cir. 1973), the very acceptance of a bribe by a public official may be evidence of a predisposition to do so when the opportunity is presented.[13]

In resolving the issue of predisposition, the jury must determine the defendant's subjective intent. Except in unusual cases, intent can be proven only through circumstantial evidence. The factors ordinarily relevant to the jury's inquiry, particularly the defendant's words and mannerisms at the time of the offense, are generally available only through the testimony of one or more of the participants. The jury has no opportunity to hear the voice inflections or see the mannerisms of the participants. This case is unique in that through the videotape the jury could observe the entire criminal transaction and many of the events leading up to it. It could observe whether the defendants demurred or showed any reluctance when the money was handed to each of them. The jury could observe the amount of pressure, overt or tacit, if any, placed on the defendants to accept the bribes. In short, this jury had in its hands some of the most valuable tools possible with which to conduct its inquiry into the state of mind of each defendant, the crucial factor in an entrapment defense.

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[13] Researchers have found it difficult to locate a case in which the defense of entrapment has been successfully interposed in prosecutions of public officials for accepting, agreeing to receive, or soliciting bribes. *See* Annotation, Entrapment to Commit Bribery or Offer to Bribe, 69 A.L.R.2d 1397, 1431 (1960). Defendants have cited to no such case, nor has our independent investigation uncovered one. This is to be contrasted with the occasional successful entrapment defense by those persons who have been enticed by public officials to make the payments. *See, e.g.*, United States v. Klosterman, 248 F.2d 191 (3d Cir. 1957). *But see* United States v. Bocra, 623 F.2d 281 (3d Cir.), *cert. denied*, 449 U.S. 875 (1980).

The Ninth Circuit recently reviewed the factors which must be considered in determining predisposition, and concluded that, "[w]hile none of the factors alone indicates either the presence or absence of predisposition, the most important factor, as revealed by Supreme Court and other decisions, is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement." *United States v. Reynoso-Ulloa*, 548 F.2d 1329, 1336 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). The court stated, "We have found no case in which the defense of entrapment (as opposed to cases dealing with due process principles) was successful where the defendant had not indicated reluctance to engage in illegal activity." *Id.* at 1336 n.11.

The facts of this case are unlike any of the few in which the entrapment defense has been successful. *In United States v. Klosterman*, 248 F.2d 191, 193 (3d Cir. 1957), the government contacted a reluctant intermediary eleven times before he agreed to make the necessary introduction. The other defendant in *Klosterman* was, as the subject of an IRS investigation which had been continuing "for an unusual length of time," under anxiety and therefore "more susceptible" to the government's persuasion. *Id.* at 196. In *Sorrells v. United States*, the agent "lured" defendant by "repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War." 287 U.S. at 441. In *Sherman v. United States*, the defendant, after rebuffing numerous requests by the government agent, finally relented and sold drugs to the agent, who had played upon the defendant's sympathy by predicating his request upon his suffering from lack of narcotics. 356 U.S. at 373. *See Wall v. United States*, 65 F.2d 993 (5th Cir. 1933). The situation here is obviously not analogous. Defendants in this case point to no statements or gestures which indicate any reluctance whatsoever to accept the proffered payments.

Although we have concentrated primarily on defendants' acceptance of the payments to demonstrate that predisposition was a jury issue, even were we to disregard certain other evidence relied on by the government to which defendants vigorously object, there was additional evidence which the jury may have credited in finding predisposition. Ellis Cook, a lawyer associated with Criden, testified that Criden told him that he had given money to Schwartz in return for Schwartz' introducing him to Jannotti. A607. This payment of what might be considered a "finder's fee" was made to Schwartz shortly after he had received the $30,000 payment from the agents. Schwartz' acceptance of a payment for introducing Criden to Jannotti, another public official, so that Jannotti could participate in a similar transaction could be considered by the jury to demonstrate that he was disposed to wrongdoing.[14] *See United States v. Dickens*, 524 F.2d 441, 445 (5th Cir. 1975), *cert. denied*, 425 U.S. 994 (1976) (defendant evidenced predisposition by "introduc[ing] his co-defendants to the prospective buyer").

A former law partner of Schwartz testified that Schwartz described the sheik's representative to him as being "a bright, capable individual who came prepared . . . ." A814. The jury might have inferred that Schwartz' failure to describe the representative as over-bearing was further evidence that Schwartz did not, even in retrospect, view the transaction as one in which his will had been overborne.

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[14] Other courts have recognized that a defendant's post-crime actions are acceptable as evidence from which an inference of predisposition can be made. *See, e.g.,* United States v. Jenkins, 480 F.2d 1198, 1200 (5th Cir.), *cert. denied*. 414 U.S. 913 (1973).

In addition to its jury instructions on the entrapment defense in general, the district court in its charge placed special emphasis on, and specifically placed before the jury for its consideration, some of the very questions of fact which that court later resolved differently than did the jury. Portions of that charge have been set forth above. When the district court advised the jury that it could find predisposition solely from the fact that a defendant was ready and willing to commit the offense for which he was currently on trial, the court cautioned that,

> in order to find predisposition based merely upon the fact that the defendant did in fact commit the crime he was induced to commit it is very important that you compare and analyze the issue of the alacrity with which a defendant joined the enterprise versus the extent of the inducement which was offered to him.

A1363.

After being carefully and specifically instructed on the significant factual issues in this case, the jury found the defendants guilty, thereby rejecting the entrapment defense. Its verdict represents a finding that, based on the totality of the evidence, including the observations by the jury of the actions, words, voice inflections and mannerisms of the defendants and the F.B.I. agents, the defendants were predisposed to engage in political corruption. The jury's verdict also represents a rejection of the notion that appellant Schwartz believed the $30.000 payment was a "consulting fee", as well as a rejection of the argument that the defendants were led to believe that the payment of money was simply to enable the representatives to report back to the sheik that they had made friends in accordance with the "Arab way" of doing business. Finally, it represents a rejection of defendants' argument, accepted by the district court, that the defendants were led to believe that unless they took the payments the hotel project would not come to Philadelphia.[15] The dissent's passionate grandiloquent essay on judicial responsibility and courage simply glosses over the salient fact which is inescapable because of the videotape record: defendants accepted the money readily, unprotestingly, even casually, without ever once attempting to use their consummate political skill to say, as diplomatically as the circumstances required, "Thanks, but no thanks."

The ultimate factual decisions in an entrapment case must be left to the jury. Where, as here, the jury was uniquely equipped to inquire into the calculus of human interaction, a court should not interfere with its conclusions. We conclude that in determining that defendants were entitled to a judgment of acquittal on the ground of entrapment as a matter of law the district court impermissibly substituted its own determination of the credibility of witnesses, the weight of the evidence and the inferences to be drawn from the evidence for that of the jury.

IV.

DUE PROCESS

As an alternate ground for the entry of judgment of acquittal for both defendants, the district court held that the extent of government overreaching in this case amounted to a deprivation of the defendants' due process rights. In arguing for a reversal, the government does not contend that the district court erred in assuming that such a defense would be available in appropriate circumstances even to predisposed defendants or that it erred in articulating the legal standard by which to determine whether government conduct has passed the line of "fundamental fairness." Instead, the government argues that the district court erred in its application of the appropriate legal standard.

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[15] In view of the jury's verdict, we need not consider the government's contention that the evidence of government inducement was insufficient to warrant submission of the entrapment issue to the jury.

If the contours of the entrapment defense are imprecise, we have at least been able to make an effort to delineate them. A similar delineation of the conduct circumscribed by the due process defense is, at best, elusive. Part of the difficulty stems from the differing views by those who must interpret the constitutional standard as to what are "immutable and fundamental principles of justice." *See Rochin v. California*, 342 U.S. 165, 176 (1952) (Black, J., concurring). The other difficulty lies in a tendency for the due process defense to overlap with the entrapment defense, notwithstanding the Supreme Court's clear admonition that they are separate and distinct.

In *United States v. Russell*, the Supreme Court, while firmly rejecting the defendants' effort to define the entrapment defense in terms of the government's conduct rather than the defendant's state of mind, nonetheless accepted that in certain extreme cases "the conduct of law enforcement agents [may be] so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S. at 431-32. When the issue arose again, however, three years later in *Hampton v. United States*, the eight Justices who considered the case divided into three groups. The plurality opinion, written by Justice Rehnquist for three Justices, rested on the position that once predisposition has been shown, governmental misconduct can never be used to overturn a conviction, since the "remedy of the criminal defendant with respect to the acts of Government agents . . . lies solely in the defense of entrapment," and a predisposed defendant is foreclosed from arguing entrapment. 425 U.S. 488-90. There is some language in that opinion which may be read to question the availability of any due process defense: "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." *Id.* at 490.

Two Justices, in an opinion written by Justice Powell, concurred in affirming the conviction by rejecting both the entrapment defense and the applicability of a due process defense to the facts shown. The dissenting opinion of Justice Brennan, for the remaining three Justices, focused on the "egregious" government conduct, and viewed the facts of the case as presenting an instance of the "sufficiently offensive" governmental conduct contemplated in *Russell*. *Id.* at 497.

Although the two concurring Justices whose opinion was pivotal agreed with the plurality that the government's supplying of contraband to one later prosecuted for trafficking in contraband does not constitute a *per se* denial of due process, 425 U.S. at 491 (Powell, J., concurring), they disagreed with the plurality view that "the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances." *Id.* at 492. Thus, a majority of the Court, composed of the three dissenting Justices and the two concurring Justices, has rejected the position "that the defense of entrapment necessarily is the only doctrine relevant to cases in which the Government has encouraged or otherwise acted in concert with the defendant." *Id.* at 492 n.2. Justice Powell emphasized, however, that "the cases, if any, in which proof of predisposition is not dispositive will be rare," and that "[p]olice overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction." *Id.* at 495 n.7.

We have in a prior opinion construed the language of *Russell* and *Hampton* to signify that "fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was 'outrageous.' " *United States v. Twigg*, 588 F.2d 373, 379 (3d Cir. 1978). In *Twigg*, the first case since *Hampton* in which a defendant prevailed on a due process defense, a divided panel of this court held that "the governmental involvement in the criminal activities of this case has reached 'a demonstrable level of outrageousness.' " *Id.* at 380. In the case before us, the district court held that *Twigg* compelled a comparable result. The district court based this conclusion in large measure on the inducements to which the defendants had been subjected, holding that "it is neither necessary nor appropriate to the task of ferreting out crime for the undercover agents to initiate bribe offers, provide extremely generous financial inducements, and add further incentives virtually amounting to an appeal to civic duty." 501 F. Supp. at 1204. These were the same factors on which the district court relied in its determination that defendants had not been shown to be predisposed and, hence, were entrapped as a matter of law.

It is plain from the Court's opinion in *Russell* and the separate opinions in *Hampton*, however, that a successful due process defense must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense. The genesis of the entrapment defense lay in the Court's interpretation of legislative intent; "[s]ince the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable." *United States v. Russell*, 411 U.S. at 433 (footnote omitted). We must necessarily exercise scrupulous restraint before we denounce law enforcement conduct as constitutionally unacceptable; the ramifications are wider and more permanent than when only a statutory defense is implicated.

We must be careful not to undermine the Court's consistent rejection of the objective test of entrapment by permitting it to reemerge cloaked as a due process defense. While the lines between the objective test of entrapment favored by a minority of the Justices and the due process defense accepted by a majority of the Justices are indeed hazy, the majority of the Court has manifestly reserved for the constitutional defense only the most intolerable government conduct. Here, the district court focused on the nature of the government inducements in finding a due process violation. Since we have already decided that these inducements were not so "exceedingly generous" as to negate the evidence of predisposition as a matter of law, it follows that they could not have been so overreaching as to violate the defendants' due process rights. Under the view of a majority of the Supreme Court, a finding of no entrapment does not preclude the availability of a due process defense; nonetheless, where, as here, the extent of government inducement necessarily was considered by the factfinder in its rejection of the entrapment defense, and we have held that issue as appropriately submitted to the jury, a successful due process defense must be predicated on other grounds.

The facts shown in *Twigg*, on which the district court relied, are not comparable to the government activity in this case. There, the government initiated and was actively involved in the operation of the criminal enterprise itself. As we summarized the facts:

> At the behest of the Drug Enforcement Agency, Kubica, a convicted felon striving to reduce the severity of his sentence, communicated with Neville and suggested the establishment of a speed laboratory. The Government gratuitously supplied

> about 20 percent of the glassware and the indispensable ingredient, phenyl-2-propanone. It is unclear whether the parties had the means or the money to obtain the chemical on their own. The DEA made arrangements with chemical supply houses to facilitate the purchase of the rest of the materials. Kubica, operating under the business name "Chem Kleen" supplied by the DEA, actually purchased all of the supplies with the exception of a separatory funnel. (The funnel was secured by Twigg at the direction of Kubica who was engaged in operating the laboratory.) When problems were encountered in locating an adequate production site, the Government found the solution by providing an isolated farmhouse well-suited for the location of an illegally operated laboratory. Again, there was no cost to the defendants. At all times during the production process, Kubica was completely in charge and furnished all of the laboratory expertise. Neither defendant had the know-how with which to actually manufacture methamphetamine. The assistance they provided was minimal and then at the specific direction of Kubica.

588 F.2d at 380-81. Thus, in *Twigg*, it was the DEA agents who "set up" the defendant, "encouraged him" and "provided the essential supplies and technical expertise." *Id.* at 381. In contrast, in this case the F.B.I. provided neither material nor technical assistance to the defendants; it merely created the fiction that it sought to buy the commodity — influence — that the defendants proclaimed they already possessed. In that respect, this case differs from *Twigg, Hampton,* and other drug-related cases, where the government is often involved on both the buying and selling sides of the transaction. *See Hampton v. United States*, 425 U.S. at 498 (Brennan, J., dissenting); *United States v. West*. 511 F.2d 1083, 1085 (3d Cir. 1975). This is also not a case

where the government's involvement in criminal activity has caused injury to third persons or extended beyond "the very activity for which the defendant[s] [were] prosecuted," factors emphasized by Judge Friendly in dictum in *United States v. Archer*, 486 F.2d 670, 675, 676-77 (2d Cir. 1973).

Defendants argue that both the initiation of the Philadelphia phase of the investigation and the subsequent approach to them constituted "outrageous" conduct in that the government had no reasonable basis to believe that such tactics would uncover criminal activity. We find this unpersuasive on both legal and factual grounds. The Second Circuit has recently indicated that there is no constitutionally-imposed requirement of reasonable suspicion before an undercover operation such as ABSCAM can be commenced. *United States v. Myers*, 635 F.2d 932, 941 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980). We have held, at least in the context of entrapment, that "it is *inconsequential* whether law enforcement officials did or did not act on *well-grounded suspicion* that the defendant was engaging in wrongdoing, or whether they had *probable cause* for approaching the defendant." *United States v. Silver*, 457 F.2d 1217, 1220 (3d Cir. 1972) (emphasis in original; footnote omitted). Where the conduct of the investigation itself does not offend due process, the mere fact that the investigation may have been commenced without probable cause does not bar the conviction of those who rise to its bait.

In any event, there is no evidence that the government targeted either Schwartz or Jannotti in advance. Their names emerged from discussions with Criden on whom the government relied for "Criden's proven ability to enlist corrupt politicians," particularly those with a connection to the Philadelphia area. Brief for Appellant at 49. Whether or not Criden had a reasonable basis for representing that Schwartz and Jannotti would be willing to "take a hot stove," A499, such representations provided the government with a reasonable basis for the initiation of the bribe offers made to them. As the district court found, "Criden assured the agent that, unless each individual agreed in advance to accept the money, no meeting between the representative and that individual would be arranged." 501 F. Supp. at 1197. The government's use of a middleman to bring forward corruptible officials refutes defendants' contention that they were unfairly targeted in advance by the government investigators.

The due process defense has been raised primarily in cases where defendants are accused of involvement in narcotics traffic. No federal judge can be unaware of the vastness of government undercover operations which seek to apprehend those engaged in that reprehensible trade. As Justice Powell commented in the dispositive opinion in *Hampton*, 425 U.S. at 495-96 n.7:

> One cannot easily exaggerate the problems confronted by law enforcement authorities in dealing effectively with an expanding narcotics traffic . . . which is one of the major contributing causes of escalating crime in our cities . . . . Enforcement officials therefore must be allowed flexibility adequate to counter effectively such criminal activity.[16]

Official corruption, in the form of bribery and extortion involving public officials, can, like the narcotics sales involved in *Hampton*, easily elude detection, since both parties to the transaction have an interest in concealment. Indeed, bribery may be even more difficult to uncover than drug deals. *United States v. Myers*, Nos. CR80-00249, CR80-00253, CR80-00291, slip op. at 62-63 (E.D.N.Y. July 24, 1981). A determination of what undercover operations are necessary to discover and expose corruptible public officials must be left, in the first instance, to that branch of government which has the responsibility for maintenance of public order. Unless the behavior of the F.B.I. agents rose to that level of outrageousness which would bar conviction, the conduct of agents of the executive branch who must protect the public from crime is more appropriately considered through the political process where divergent views can be expressed in the ballot box.

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[16] In *Twigg*, we distinguished *Hampton*, where the convictions were upheld, on the ground that *Hampton* was "concerned with the sale of an illegal drug, a much more fleeting and elusive crime to detect than the operation of [the] illicit drug laboratory [involved in *Twigg*]." We recognized that in "such a situation the practicalities of combating drug distribution may require more extreme methods of investigation, including the supply of ingredients which the drug ring needs." 588 F.2d at 378 (footnote omitted).

The district court's distaste for the F.B.I.'s ABSCAM operation is evident from its opinion. In referring to "the extent to which the agents were prepared to go", the district court relied on the actions of F.B.I. agents in other phases of the ABSCAM operation which related to other defendants having no connection with Schwartz and Jannotti. 501 F. Supp. at 1194-95. We have been clearly instructed, however, that the due process inquiry must focus only on the actions of the F.B.I. insofar as they related to Schwartz and Jannotti. Thus, in his opinion in *Hampton*, Justice Rehnquist remarked, "The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the *defendant*." 425 U.S. at 490 (emphasis in original). *See United States v. Payner*, 447 U.S. 727, 737 n.9 (1980). We do not, in this case, pass upon the nature of the F.B.I.'s conduct as to any defendant other than the two who are before us on this appeal. As to them, the impropriety of government conduct on which the district court relied in granting the motions for acquittal was limited to the evidence of government instigation and inducement, which, as we have already indicated, did not reach the "demonstrable level of outrageousness" necessary to compel acquittal.

In reversing the district court's judgment of acquittal on the ground of a due process violation, we do not place our imprimatur either of approval or disapproval on the government's conduct. As citizens, we have differing views of the necessity or advisability of the entire ABSCAM project. As judges, however, we rule only on whether the limits which the Constitution places on another branch of government have been exceeded. We find that the government's conduct as to these two defendants did not violate their due process rights, and that therefore the district court's judgment of acquittal on this ground must be reversed.[17]

V.

MANUFACTURED JURISDICTION

The final basis for the district court's judgment of acquittal was that "the circumstances relied upon to establish federal jurisdiction over the offenses charged were artificially created by the Government in an attempt to exceed the proper scope of federal law enforcement." 501 F. Supp. at 1205. In support of an acquittal on this basis, the district court relied on the rationale used in *United States v. Archer*, 486 F.2d 670 (2d Cir.

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[17] Judges Adams, Hunter and Garth agree that United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) is distinguishable from the present case on its facts. They would go one step further, however, and directly overrule the *Twigg* decision. They believe that United States v. West, 511 F.2d 1083 (3d Cir. 1975), relied on by the majority in *Twigg*, the district court below, and the appellees here, was implicitly reversed by Hampton v. United States, 425 U.S. 484 (1976), and that unless further guidance is given in this area, district courts, in a faithful attempt to apply *Twigg* and *West*, will continue to reach results that cannot be reconciled with the teaching of the Supreme Court in *Hampton*. In this day of heightened criminal activity, the federal judiciary must be cautious not to exercise a "veto" — especially, as in this case, a constitutional veto — "over law enforcement practices of which it [does] not approve." United States v. Russell, 411 U.S. 423, 435 (1973).

1973). The holding in *Archer* is more limited than the concept for which it was cited by the district court. In reversing convictions under the Travel Act, the *Archer* court held that, as a matter of statutory construction, the use of interstate and foreign telephone facilities did not suffice to bring the defendants within that statute. The statutory infirmity was that the three interstate phone calls relied upon to establish jurisdiction under the Travel Act were insufficiently related to the criminal activity charged or had been arranged by the federal agents for the sole purpose of providing the necessary federal nexus. Under those circumstances, the Second Circuit held that the phone calls were insufficient to transform a "federally provoked incident of local corruption into a crime against the United States." 486 F.2d at 683. The court explicitly declined to dismiss the prosecution as an abuse of federal power, although it made plain that its holding reflected its misgivings as to whether the facts showed any basis for a substantial federal interest.[18]

In contrast, in this case, we have already sustained jurisdiction under the Hobbs Act because of the substantial federal concern in protecting interstate commerce from conspiracies such as that at issue here, and the district court held that the elements of the RICO charge as to Schwartz had been properly established. 501 F. Supp. at 1186-87. These holdings necessarily indicate the sufficiency of the federal interest presented under the facts here.

The narrow reach of *Archer* can also be gleaned from the Second Circuit's own construction of it in *Unit-*

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[18] When *Archer* came before the Second Circuit a second time, Judge Friendly, the author of both opinions, stated that the ground for the decision in *Archer* "was that there had been no sufficiently meaningful use of [interstate telephone] facilities in connection with the essentially local crime committed by Archer . . . ." Archer v. Commissioner of Correction, 646 F.2d 44, 45 (2d Cir. 1981).

ed States v. Gambino, 566 F.2d 414, 419 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978). In *Gambino*, the court sustained the conviction of defendants under, *inter alia*, the Hobbs Act and RICO over the objection of defendants that jurisdiction had been contrived by the F.B.I.'s creation of an undercover garbage collection business for the purpose of trapping the suspected racketeers. The court pointed out that in *Archer* the phone calls "were purposely made in order to create an interstate element for what would otherwise have been merely a local crime." *Id.* at 419. Although the F.B.I.'s garbage business in *Gambino*, unlike the hotel project involved here, actually engaged in interstate commerce by obtaining equipment from Texas and arranging to dump its garbage in New Jersey, the court in *Gambino* indicated that its decision upholding jurisdiction did not turn on that fact, stating that "[s]ince the garbage collection business in the Bronx was sufficiently related to interstate commerce . . ., it was really unnecessary for the federal agents actually to buy machinery or to dump garbage outside the state. The ruse itself was not objectionable, and the allegedly spurious out-of-state involvement was in any event, irrelevant." *Id.*

We view the district court's judgment of acquittal on the grounds of manufactured jurisdiction as essentially an amalgam of its determinations that jurisdiction under the Hobbs Act was insufficient and that the entire ABSCAM operation involved federal overreaching. Since we have already found that neither of these holdings can be sustained, we believe that the circumstances of this case do not warrant acquittal on the independent basis of manufactured jurisdiction.[19]

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[19] In light of our holding, we express no opinion on whether a finding of manufactured jurisdiction could support a judgment of acquittal, as ordered by the district court in this case, or can be used only as the basis for dismissal of the indictment for lack of jurisdiction, which was the procedure followed in *Archer*.

VI.

CONCLUSION

In summary, we have closely examined each of the bases on which the district court reversed the defendants' convictions, the relevant evidence, and the applicable law. We conclude (1) there was jurisdiction under the Hobbs Act; (2) the evidence of defendants' predisposition was sufficient to support the jury's conclusion of no entrapment; (3) the conduct of the government agents as to Schwartz and Jannotti did not violate their due process rights; and (4) there was no basis on which to direct an acquittal on the ground of manufactured jurisdiction. For the foregoing reasons, we will reverse the district court's order of November 26, 1980 dismissing Count III of the indictment and granting judgments of acquittal, and direct reinstatement of the jury's verdict.

ALDISERT, *Circuit Judge*, Dissenting, with whom Judge Weis joins, with the exception of Part VII.

The division of the court in this extremely important entrapment case reflects fundamental and irreconcilable differences in the values attached to two primary integrants of the American tradition of justice:

> To what extent should federal judges assume the responsibility for protecting American justice traditions, and to what extent should judges delegate this responsibility to the jury?
>
> To what extent should federal judges endorse tactics of the kind used by the Federal Bureau of Investigation in this case?

The majority opinion reads like a paean to the FBI for its conduct in this case; but as an American citizen and as a federal judge, I find that conduct revolting. I agree completely with Justice Holmes:

> It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.[1]

The FBI has a long and proud history. It has earned the admiration and respect of the American people for its efficiency and fairness. The accomplishments of its agents have been dramatically portrayed in books and on the screen. But like all human institutions it is subject to the frailties of man. Under its distinguished director William H. Webster the instances in which it has been faulted for its conduct indeed have been few in number, and in that we may take great satisfaction. One reason for the low incidence of aberrational conduct has been the sense of responsibility of the Bureau's men and women. An additional restraint has been the knowledge that the courts, in administering the criminal justice system, would scrutinize the agents' activities. The chief deterrent, however, perhaps is the resolve shared by agents, judges, and the public that the FBI not become an American version of the secret police so infamous in many countries.

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[1] *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

I.

A.

We judges come to our robes bearing the stigmata of our respective experiences. I readily confess that being born to an immigrant father and reared in a Western Pennsylvania community peopled largely by European immigrants and their children placed indelible impressions on me at an early age. The religious and political refugees who came to this land at the turn of the century had much to fear from the old country's secret police, but one of the greatest abhorrences was the *agent provocateur*, a person employed to pretend sympathy with members of a group and incite them to illegal action, and thus to expose them to apprehension and punishment. From my childhood I remember stories told in broken English by gnarled refugees from Russia, the Ukraine, and Poland, recounting in graphic detail the abuses inflicted upon them in peasant villages by the Ochrana, the secret police of the Czar.[2] Lacking the personal drama, but nevertheless equally authoritative, were academic studies and news accounts of the later operations of the OGPU, the dreaded secret police of the Stalinist era.

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[2] A most infamous *agent provocateur* was Azeff, "to whom the enduring reputation of the Ochrana owes its deeper shades of infamy." Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 Yale L. J. 1091, 1092 n.8 (1960)(quoting Rowan, The Story of Secret Service 374 (1937)).

The apogee of government artifice, guile, and deceit was reached with the formation of the Gestapo in Nazi Germany. The story of the Holocaust is an account of the *agent provocateur* at his ruthless worst. It is an account of fraudulent representations to determine the identity of Jews, of cajoling incrimination of father by son and son by father, of lies about the purpose of detention and detention camps, "*Arbeit Macht Frei*" ("Work Will Set You Free"), and of gas chambers disguised as shower rooms. Such spectres cannot be easily exorcised.

The Gestapo were the consummate users of the "honey pot," a technique government witness Melvin Weinberg proudly described as the technique the government utilized in this case.[3] The FBI employed the honey pot through a secret agent who, by ostentatiously flashing and giving away wads of money, would attract both the wary and the unwary, the scrupulous and the unscrupulous. Having attracted, the honey pot would serve also to capture those who were willing, that is, predisposed, to make the flight to the honey in the first place, as well as those who would have been unwilling, but who made the flight to the pot only because of the strength of the lure. But this trap was particularly selective: the operators of this honey pot personally selected those who could share the sweet stuff. The party was by invitation only; when the guests came to the pot it was not necessary for them to ask for a sample; rather, their mouths were opened for them and the honey poured down their gullets.[4]

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[3] Weinberg Cross Examination, A254.

[4] An analogy by Washington, D.C., lawyer William Hundley illustrates my point:

> "It's one thing to take a street where hookers work, dress a policewoman up as a hooker and put her out there, . . ." It's

Moreover, it is no longer open to question that the ABSCAM operation was deliberately leaked to the press. *See United States v. Criden*, 633 F.2d 346, 348 (3d Cir. 1980), *cert. denied sub nom. Schaffer v. United States*, 449 U.S. 1113 (1981). I agree with Professor Paul Chevigny of New York University:

> [T]he power to tempt into crime and then to leak the story is a particularly potent combination. Once the authorities have selected the target of their investigation, they can make the charge "stick" in the press, regardless of how much temptation was offered, regardless of whether the courts would recognize a defense, and regardless of the reason the victim was chosen.[5]

NOTE — *(Continued)*

> something else entirely, . . . "to take Bo Derek and throw her naked into the Notre Dame locker room."

Quoted in *Some Questions of Ethics*, Newsweek, Feb. 18, 1980, at 32.

[5] Chevigny, *A Rejoinder*, The Nation, February 23, 1980, at 205. Professor Chevigny also expressed concern about the government's power to select its targets:

> As stories have emerged over the past fifteen years about the practices of law-enforcement agencies in offering opportunities for crime (whether they amount to entrapment in the technical sense or not), a chief concern has been that the focus was on "political" people. That used to be a codeword for Catholic pacifists, the Vietnam Veterans Against the War, Black Panthers and assorted others who were convicted or acquitted, according to the vicissitudes of the venue and the criminal law, for crimes against the state in which police inducements were involved. For better or worse, the code word now extends to Republican and Democratic politicians. But the danger remains the same: the power to offer a temptation to crime is the power to decide who shall be tempted. It can be and often has been used as a way for the Government to eliminate its enemies, or for one faction in Government to get rid of another. Put simply, the question raised by actions like Abscam is: Can we leave it to the investigators to decide which politician to tempt?

Id. at 204-05.

To the Department of Justice, its operation was a taste of honey; to me, it emanates a fetid odor whose putrescence threatens to spoil basic concepts of fairness and justice that I hold dear.[6] That the FBI has earned high praise for its performance in the traditional discharge of its duties should not immunize the secret police tactics employed in its ABSCAM operation from appropriate and vigorous condemnation. If we fail to correct when necessary, we do no favors to those who have erred.

B.

The majority allow the entrapment question in this case to be resolved by a lay jury. As staunchly as I believe that the jury, reflecting the conscience of the community, should be society's instrument for resolving controverted facts once a minimum legal threshold has been established, I stoutly believe also that the jury, untrained in the law, should never be called upon to design and construct that threshold.[7] This is precisely

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[6] Describing another era, the historian Sir Erskine May eloquently declared:

> Nothing is more revolting to Englishmen than the espionage which forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gayety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency. Rulers who distrust their own people must govern in a spirit of absolutism; and suspected subjects will be ever sensible of their bondage.

2 E. May, Constitutional History of England 275 (1863).

[7] *See e.g.*, *Hollinger v. Wagner Mining Equip. Co.*, ___ F.2d ___, No. 81-1359 (3d Cir. Dec. 22, 1981)(Aldisert, J., dissenting); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). In *Brokers Title Co. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174 (3d Cir. 1979), we stated:

> Many sins in the law have at times been swept under a jurisprudential rug in the guise of fact finding, but neither justice

what the majority have done here. They permit the jury to perform a responsibility which by law and by formal commission belongs to the judges of the Third Article.[8]

Defining the precise division of authority in the judge-jury relationship is always a sensitive and delicate responsibility. Where the defense of entrapment is interposed, however, the responsibility is appreciably intensified. The mere submission to the jury may present the jury with a Hobson's choice as to the defendant, because the entrapment defense requires the defendant to admit the commission of deeds which, but for their inducement by the government, would constitute the commission of a crime. A lay jury conditioned by years of published criticism of judges "who let the guilty go free on a technicality" may well be reluctant to give effect to the defense.

In our American legal tradition the jury has but one function — to resolve controverted facts. I defend this simple thesis: There was not one fact, controverted or otherwise, or resulting inference that allowed the submission of the entrapment issue to the jury. Although one can fashion a lengthy and tortuous argument that, under the facts here, the entrapment issue was properly submitted to the jury, I am not willing to have basic precepts of the American legal tradition so papered by reams of irrelevancies that only a jurisprudential masquerade is left for the viewing. I would hold, based on all

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NOTE — *(Continued)*

> nor reason, neither public policy nor logic, compels us to do so here. When questions of law dominate uncontroverted material facts, resort to fact finding from a congeries of irrelevant evidence is unnecessary.

Id. at 1177.

[8] The expression is that of Professor Bernard J. Ward of the University of Texas. Ward, "The Judges of the Third Article," unpublished luncheon address, Judges' Luncheon, 36th Annual Judicial Conference, Third Judicial Circuit of the United States, Pittsburgh, Pa., October 15, 1973.

the testimony, crediting specially that of the government and drawing all reasonable inferences in its favor, that there was inducement as a matter of law and that a reasonable jury could not conclude that the government proved beyond a reasonable doubt that the defendants were predisposed to commit the crime. Under these circumstances, there was no jury question. Under these circumstances, there were no controverted facts for the jury to resolve. Under these circumstances, "[i]t is as fatal as it is cowardly to blink facts because they are not to our taste."[9]

In my approach to this case, I acknowledge that transgressors must be punished for conduct that violates legal standards, but I place a restriction on this abstract theory: those who receive society's commission to go forth and capture transgressors may not themselves transgress. A free society can exist only to the extent that those charged with enforcing the law respect it themselves. "There is no more cruel tyranny than that which is exercised under cover of the law, and with the colors of justice."[10] The law enforcers may themselves offer inducements to transgress *if, and only if*, the persons so induced were predisposed to violate the law and the offered inducements provided only the opportunity to act on their predispositions. A society cannot long remain free if we permit the law enforcer to offer more than opportunity for transgression; a free society cannot and will not endure if it permits law enforcers to select individuals arbitrarily, and then to proceed by deception to persuade, cajole, entice, and implant a law-breaking disposition that was not theretofore present. Just as we will not admit into evidence a statement obtained by police methods that overbear or overwhelm the will, even if it admits to the commission of a crime, *Fikes v. Alabama*, 352 U.S. 191 (1957); *Brown v. Mississippi*, 297 U.S. 278 (1936), we refuse to deem as an offense against society conduct resulting from ideas which police deliberately implanted in the mind of the actor, *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

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[9] J. Tyndall, *Fragments of Science* in Science and Man.

[10] Montesquieu, *De l'Espirit des Lois* (1748).

Dissenting in *Olmstead v. United States*, 277 U.S. 438 (1928), Justice Brandeis stated:

> If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution.

Id. at 485 (Brandeis, J., dissenting).

Federal public policy, and, indeed, basic social policy, dictate that it is better to let a technical transgressor go free than to allow federal law enforcement officials to manufacture crime that entraps the unwary innocent. The predicate of this public policy against entrapment is threefold. First, it recognizes the awesome power of the financial and personnel resources at the disposal of federal law enforcement authorities. Second, reflecting the Judeo-Christian understanding that weakness has inhered in mankind since the days of Adam, it appreciates that even the most morally scrupulous members of society can be persuaded to breach behavioral standards if presented with sufficiently tempting inducements. Third, it acknowledges that a line can be drawn that will permit the proper use of government resources to identify and prosecute the wrongdoer and at the same time serve as an instrument to prevent abuse of those resources. If the government presents temptations, small or large, but the defendant is predisposed to succumb to them, then the government's conduct is usually permissible;[11] if the defendant is not predisposed, then the government's conduct is beyond the pale.

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[11] This court has held that, as a matter of fundamental fairness, where the government's involvement in criminal activities at-

The majority and I differ upon where to draw that line and upon the relative competences of judges and juries to protect society from secret police excesses. The majority's superbly crafted essay selects assorted legal precepts and then unerringly extends "a maxim or a definition with relentless disregard of consequences to 'a dryly logical extreme.' "[12] It bids fealty to Judge McSherry's view, that "[o]bviously a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results."[13] I reject this process, whether one calls it *Begriffsjurisprudenz*, mechanical jurisprudence, or slot machine justice. I believe that the proper test of a legal rule is the extent to which it contributes to the establishment and preservation of a social environment in which "the quality of human life can be spirited, improving and unimpaired;"[14] and that law must be judged by the results it achieves, not by the niceties of its inherent structure. "[I]t must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictures with which its rules proceed from the dogmas it takes for its foundation."[15]

I refuse to proceed as if no important social issue were involved in this case which implicates both the wrongdoing of city public officials and the questionable activities of federal police officials. I believe that we are confronting an extremely sensitive intersection between morals and positive law, which demands that the judici-

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tains a demonstrable level of outrageousness, prosecution for the crime will be barred even if the defendant is shown to have been predisposed. *United States v. Twigg*, 588 F.2d 373, 380-82 (3d Cir. 1978).

[12] *Hynes v. New York Cent. R. Co.*, 231 N.Y. 229, __, 131 N.E. 898, 900 (1921) (Cardozo, J.).

[13] *Gluck v. Baltimore*, 81 Md. 315, __, 32 A. 515, 517 (1895).

[14] *Croker v. Boeing Co.*, 662 F.2d 975, 1002 (3d Cir. 1981) (in banc) (Aldisert, J., concurring and dissenting) (quoting Jones, *An Invitation to Jurisprudence*, 74 Colum. L. Rev. 1023, 1030 (1974)).

[15] Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 605 (1908).

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ary assume rather than shirk responsibility. To paraphrase Judge Walter V. Schaefer, the philosophical difference that divides this court depends upon a judge's unspoken notions about the role of the courts. If he or she views the role of the court as a passive one, he or she will be willing to delegate the responsibility for unpopular issues to the jury and not care greatly what the result may be. If he or she views the court as an instrument of society designed to reflect in its decisions the highest values of the American legal tradition, he or she will be more likely to risk public disapproval and to measure an unpopular cause against the highest ideals and aspirations of the time.[16]

The rights conferred upon our society by judges of the Third Article emanated from cases in which the defendants were unpopular and generally regarded as transgressors — Dollree Mapp, Danny Escobedo, and Ernesto Miranda quickly come to mind. In each case, a court, not a jury, drew the line of demarcation between permissible and impermissible police conduct to insure that enforcers of society's laws would not violate established moral frontiers while exercising their stewardship; it was federal judges, unmindful of editorials and broadcast plaudits, who chose to stand tall and unbending. Like District Judge John P. Fullam, those federal judges were unwilling to relegate the formulation of these protections to the "coquetry of public opinion, which has her caprices"[17] in the jury room.

II.

Let me clear the air as to what I perceive case law to regard as legitimate and, therefore, permissible, undercover police work, and that which goes beyond the pale.

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[16] Schaefer, *Precedent and Policy*, 34 U. Chi. L. Rev. 3, 23 (1966).

[17] Edmund Burke, Letter to Thomas Burgh, New Year's Day, 1780.

In the permissible category I put all undercover activity that searches out contemplated or ongoing criminal conduct and even results in actual participation in the illegal enterprise.[18]. In this same category I would justify an agent's inducement of others to engage in crime, so long as there is proof of predisposition by the others to participate in the illegal activity. Where, as here, there is absolutely no proof that the defendants had any disposition to commit an illegal act but for the government's inducement, however, then the government's actions are impermissible, and the defense of entrapment is available as a matter of law — and it is for a judge and not a jury to blow the whistle on the improper conduct.

The entrapment defense thus implicates two interrelated but discrete elements: inducement and predisposition. *See Hampton v. United States*, 425 U.S. 484 (1976); *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932). Entrapment is a "relatively limited defense," *Russell*, 411 U.S. at 435, that "focus[es] on the intent or predisposition of the defendant to commit the crime." *Id*. at 429. When the entrapment issue is joined, the burden is on the government "to disprove the whole defense beyond a reasonable doubt." *United States v. Watson*, 489 F.2d 504, 510 (3d Cir. 1973); *see Government of the Virgin Islands v. Cruz*, 478 F.2d 712, 717 & n.5 (3d Cir. 1973).

The defense is a matter of statutory interpretation, rooted in the notion that Congress does not intend to punish a defendant who has committed all the elements of a proscribed offense if he was induced to commit them by the government. *Russell*, 411 U.S. at 433-35; *Sorrells*, 287 U.S. at 445-51. The prosecution is not defeated by proof that the government has participated in deceit or merely provided an opportunity or a facility to commit the offense; the defense of entrapment is available only when "the Government's deception actually implant[ed] the criminal design in the mind of the defendant." *Russell,* 411 U.S. at 436. In the felicitous phrase of Chief Justice Earl Warren, "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Sherman,* 356 U.S. at 372. The crucial question, then, is whether the defendant was induced to commit the offense by agents of the government or predisposed to commit like offenses whenever the opportunity arose. We have recognized, however, that evidence of inducement may be highly probative of predisposition. Judge Rosenn has expressed it succinctly: "[T]he stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the inducement rather than to the defendant's own predisposition." *Watson,* 489 F.2d at 511. *See also United States v. Burkley,* 591 F.2d 903, 915-16 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 966 (1979).

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[18] This assumes that the government participation in the crime is not so extensive and outrageous as to constitute a violation of fundamental fairness. *Twigg*, 588 F.2d at 380-82.

Chief Justice Warren emphasized that the function of law enforcement is the prevention of crime and the apprehension of criminals, and "that function does not include the manufacturing of crime." *Sherman,* 356 U.S. at 372. A review of the evidence in this case persuades me that the agents of the FBI were consummate manufacturers of crime. They built the plant, they designed the machinery, they operated it, and they covertly solicited the defendants to be customers of their product. It is difficult to conceive of a stronger case of inducement by the government.[19] Yet the majority observe, with an almost casual tone:

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[19] The opinion of the court below summarized applicable inducement concepts as follows:

> Under the general label "inducement" the reported decisions have included such diverse elements as suggesting that the crime be committed, providing some or all of the instrumentalities or facilities needed to complete the crime, actively partici-

> In view of the jury's verdict, we need not consider the government's contention that the evidence of government inducement was insufficient to warrant submission of the entrapment issue to the jury.

Majority Opinion typescript at 54 n.15. Faced with the uncontroverted facts here, the government's contention, offered for the first time at oral argument, that no *prima facie* case of inducement was presented, does not reflect sober analysis or serious appellate argument but a chatter of irresponsible frivolity. Studiously avoiding the impression that their product was illegal, the FBI acted efficiently to ensnare their arbitrarily selected customers within the ten days the local task force had been allotted.[20] Their technique was a page torn from Aleksandr Solzhenitsyn's vivid description of the dreaded Soviet Blue Caps: "Just give us a person — and we'll create the *case*!"[21] I am persuaded that this case presents a classic model of the type of entrapment that our society emphatically condemns.

III.

Presented with a mere prima facie case of government inducement or lack of a defendant's predisposition, the trial court is obliged to submit an entrapment issue to the jury for a factual determination. Where the evi-

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> pating in the commission of the crime, providing varying degrees of incentives, providing varying degrees of persuasion or even coercion, or a combination of these ingredients.

United States v. Jannotti, 501 F.Supp. 1182, 1190 (E.D.Pa. 1980). I agree with Judge Fullam that some or all of these were established by the evidence in this case.

[20] The ABSCAM show was to play only 10 days in Philadelphia. The operation had to move to another location if fish were not caught. *See* the record in *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980), *cert denied sub nom. Schaffer v. United States*, 449 U.S. 1113 (1981).

[21] A. Solzhenitsyn, The Gulag Archipelago 146 (1973).

dence of inducement is overwhelming and the defendant's lack of predisposition so evident that it points to only one reasonable conclusion, however, "the question may be decided as a matter of law, just as any other factual issue admitting of only one conclusion." *United States v. Klosterman*, 248 F.2d 191, 195 (3d Cir. 1957). *See Sherman*, 356 U.S. at 373-76.

Our role in reviewing the evidence is not to determine whether the defendants' conduct amounted to an offense under the statute; yet the majority's discussion of the evidence is oriented to precisely that end. As such, the discussion is irrelevant to what I perceive to be the sole issue before us: did the government present evidence sufficient to sustain a jury finding that, beyond a reasonable doubt, the defendants were predisposed to commit the offenses?

A.

I examine first the threshold issue of inducement. ABSCAM was conceived by the FBI for one purpose: to seek out public officials vulnerable enough to accept the lush gifts dangled before their eyes by purported representatives of a fictional Middle Eastern potentate. They enlisted as their chief executive officer an old friend, convicted career swindler Melvin Weinberg, who not only was given probation by a federal district court through the intervention of the FBI, but also was paid extraordinarily well for his services. They entered Philadelphia by seeking introductions through attorney Howard Criden, who had extensively participated in corrupt transactions for cash rewards and eagerly sought opportunities for more of the same, and they further tempted him by dangling the lure of potential legal fees. FBI agent Michael Wald, in the guise of Abdul Enterprises "expeditor" Michael Cohen, advised Criden that the sheik was interested in building a hotel in Philadelphia, and perhaps in other investments in the area, but only if he could be assured of having the friendship of titled municipal government officials.

Wald eagerly sought to deal with every significant official whom Criden and others named. Criden and Wald lured Schwartz and Jannotti not only with offers of cash payments to them but also with the prospect of a multi-million dollar investment in downtown Philadelphia. It is reasonable to conclude, indeed it is the only reasonable conclusion, that the councilmen would be desirous of such an injection of funds into the city's economic arm, because it would provide jobs and expand the city's tax base. They were repeatedly assured that the project would be "legitimate." In addition, "the very amounts of the bribes were, to paraphrase the language of the court in *Scriber v. [United States*, 4 F.2d 97, 98 n.4 (6th Cir. 1925)], 'a substantial temptation to a first offense.'" *United States v. Jannotti*, 501 F.Supp. at 1200.

These defendants were led to believe that the Philadelphia investment was entirely contingent on the sheik's confidence, in accordance with the dictates of "the Arab mind," that he had "friends" with titles in city government. These representations were not only made by Wald directly to Jannotti, as the majority admit, but also to Schwartz via a Tinker to Evers to Chance play: Wald to Criden to Schwartz. The majority blithely ignore the heart of the ruse devised by the FBI entrepreneurs and naively suggest that since the record does not disclose an actual communication, the basic premise underlying the scam in ABSCAM was not communicated to the very sophisticated president of the Philadelphia City Council by those who sought to enlist him.[22] It was

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[22] The majority argue as to Schwartz:

> It may be that the district court, aware of similar representations with regard to the "Arab mind" which were made to other ABSCAM participants, interpolated them as to Schwartz. Whatever the explanation, since this was the "most important"

Wald, the government agent — not Criden, not Schwartz, not Jannotti — who introduced this concept, which was summarized by Judge Fullam:

> Perhaps the crucial aspect of the undercover operation was its emphasis upon "the Arab mind,"

NOTE — *(Continued)*

> factor to show that the appeal to civic duty was too overwhelming an inducement for any public official to resist, once this factor is negated, the house of cards built upon it collapses.

Majority Opinion typescript at 48-49.

The majority contend that, as to Jannotti:

> [T]here is no question that a reference to the "Arab mind" was made to him, and that Wald also represented that this "is the method of business that these people are used to, and that is how they conduct business . . . ." A860. . . . Whether these statements can be construed as a representation that only if Jannotti accepted the money would the hotel come to Philadelphia is somewhat questionable. Such a conclusion is even more equivocal in light of the following colloquy which took place before the reference to the "Arab mind":
>
> > JANNOTTI: Who could refuse a project like that?
> >
> > WALD: Nobody could, that's my point, alright, *but I've been told the City of Philadelphia is where this, ah, this construction project is going. I mean this is where he is going to be. There is where he wants it . . . .*
>
> A852 (emphasis added). Later in the meeting Wald reiterated that "Philadelphia has already been sold, to the man." A876. *See also* A864, A880. Thus, even as to Jannotti, at most the evidence presents the basis for differing arguments to the jury as to the interpretation to be placed on the conversations.

Id. at 49.

The majority's argument as to Jannotti goes to whether the offense of *extortion* was made out, an issue not controverted in entrapment. But their contention does not refute the applicability of this evidence to predisposition. Simply stated, Jannotti's response, no matter how interpreted, has relevance to the issue of his predisposition, a relevance congruent with the "Arab mind" scenario to which he had been exposed.

> "the Arab way of doing business." A constant theme of the agents' representations was that their principals would not undertake any project unless first assured of the "friendship" of the persons with whom they were dealing. They were impressed with titles, with persons in official positions of power and influence. Their concept of "making friends" was that money had to be paid. At least insofar as the Philadelphia aspects of the investigation were concerned, there was no suggestion that the putative sheik required or expected any violation of the law in exchange for the payment; he merely wished to be assured that he had "friends" in high places.

Id. at 1194. Finally, neither defendant volunteered for the sheik's "friendship," nor did they actively seek or suggest that cash payments would be appropriate. They were actively recruited and solicited to accept large amounts of money, and they did.

It is in the context of inducement that the stated purpose for the payments is relevant. The threshold issue in entrapment is not what constitutes the crime of bribery or extortion but what is the extent of the inducement offered by the government agents. The statements of the defendants that they would aid a "legitimate" project and the government agents' failure to disabuse the defendants of their expressed belief in the plan's legitimacy — while they nevertheless pressed money on the defendants — are significant in appraising the extent of the government's importunities.

The proof of inducement is so compelling that ordinarily I would quickly dispose of the government's argument. I have discussed the evidence of inducement at some length, however, because of its relevance to the question of predisposition. What Judge Rosenn expressed in *Watson* bears repetition: The greater the inducement, the heavier the government's burden of proving predisposition. 489 F.2d at 511.

B.

Criminal predisposition or intent, the "focus" of the entrapment defense, *Russell*, 411 U.S. at 429, is perforce, under the teachings of the Supreme Court, an inquiry into the defendant's subjective state of mind. "[T]he controlling question [is] whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Sorrells*, 287 U.S. at 451. The inquiry must begin with the presumption that the defendant is innocent; that is, that he was not predisposed to commit the crime. The government cannot overcome that presumption except by showing criminal predisposition beyond a reasonable doubt. There is no question, however, that the prosecution is allowed considerable latitude in introducing evidence to prove predisposition. "On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence." *Sherman*, 356 U.S. at 373 (quoting *Sorrells*, 287 U.S. at 451).

The majority avoid a detailed discussion of the evidence in the government's best case scenario of proof of predisposition, and for good reason: the government's case does not survive close analysis. The government relies heavily on certain recorded declarations of alleged co-conspirators Criden and Johanson, to the effect that Schwartz and Jannotti would be ready and willing to accept illegal payments in return for political favors. It anchors its argument on the familiar evidentiary rule that declarations made in furtherance of a conspiracy are admissible against co-conspirators as evidence of guilt. *See* Fed. R. Evid. 801(d)(2)(E). It cites evidence that Criden and Johanson indicated that Schwartz and Jannotti would be "interested in doing business," A453, and that

Criden, *at a time when he had not even met either defendant,* told Wald that each would "take a hot stove." A499. Jannotti, Criden said, had "been through this . . . a hundred times" and would "take a hot stove, like a vacuum cleaner." A895, 905.

The government argues that the jury could credit these declarations as evidence of the defendants' reputations, and therefore as probative of the ultimate factual question of predisposition. *Cf.* Fed. R. Evid. 803(21) (permitting hearsay evidence of reputation). The difficulty with this argument is that Criden and Johanson were not asked for and did not attest to the councilmen's reputations among their associates or in the community. Instead, the FBI agent, Wald, asked for and was given statements of personal opinion. Evidence of opinion is competent to prove character or a trait of character under the Federal Rules of Evidence, a major departure from the common law. Fed. R. Evid. 405(a); *see United States v. Curtis,* 644 F.2d 263, 267 (3d Cir. 1981); 2 J. Weinstein & M. Berger, Weinstein's Evidence at 405-1 to 405-10 (1980) (legislative history). Rule 405 permits only "testimony in the form of an opinion," however, and Criden and Johanson did not testify. Untested out-of-court declarations of opinion are not admissible to prove character, and if they were admissible they would be insufficient to support a finding of predisposition under the circumstances of this case.[23]

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[23] Because the quoted declarations were evidence of opinion and not of reputation, I need not reach the question of whether a co-conspirator's statements of reputation would be admissible to prove character. I note, however, that Congress and the drafters of the Federal Rules of Evidence were careful to discriminate between reputation and opinion evidence. Rule 803(21) provides that evidence of reputation is not excluded by the hearsay rule, but there is no hearsay exception for evidence of opinion. Opinion evidence is permitted only by Rule 405, which is limited to testimony. Moreover, there are important functional distinctions between reputation and opinion. Hearsay evidence of a person's reputation can be re-

The government thus attempts to bolster its case by relying on conspirators' declarations to prove character, but it succeeds only in demonstrating the fundamental insufficiency of its evidence. Rule 405(a) permits proof of character by testimony as to reputation or by testimony in the form of an opinion; and because predisposition is an essential element of the entrapment defense, Rule 405(b) permits proof of specific instances of conduct. Therefore, the government might have offered evidence that the defendants had accepted illegal payments in exchange for official favors on previous occasions, *cf. United States v. Lemons*, 470 F.2d 135 (3d Cir. 1972) (per curiam), *cert. denied*, 412 U.S. 929 (1973) (evidence of prior dealings in illegal narcotics), or testimony that they were reputed among their associates or in the community to be disposed to accept bribes, *cf. United States v. Robinson*, 446 F.2d 562 (5th Cir.) (per curiam), *cert. denied*, 404 U.S. 959 (1971) (evidence of reputation for unlawful dealings). The prosecution shunned these methods of proof, however, and offers only untested declarations of opinion to support the verdict. Even if I considered this evidence admissible to prove predisposition, I would hold it insufficient as a matter of law to justify submitting the question to the jury. Without procedural

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NOTE — *(Continued)*
butted without cross-examining the declarant, merely by introducing reputation witnesses in rebuttal. A statement of opinion can be challenged or rebutted only by cross-examination.

The Fifth Circuit, sitting in banc, recently approached this problem in another way. In *United States v. Webster*, 649 F.2d 346 (5th Cir. 1981), the court overruled a long line of local precedent and held that hearsay evidence is never admissible to prove predisposition. The court had "little trouble rejecting the government's argument that such statements are admissible under the character/reputation provisions of the Federal Rules of Evidence, *see* Fed.R.Evid. 404(a)(1), 405, 803," 649 F.2d at 350 (footnotes omitted), and held that predisposition is not a character trait but a state of mind and thus that the "character/reputation provisions" do not apply.

safeguards designed to test its trustworthiness,[24] hearsay evidence of opinion is simply insufficient to support a guilty verdict in a criminal case.

Given the evidence of overwhelming inducement, the government's evidentiary burden to prove predisposition was commensurately substantial. I need not attempt to delineate the outer limits of that burden here, because, in my view, the prosecution's proof fell far short of the requirement. The government's best case scenario shows that the defendants arrived at the Barclay at the government's invitation, discussed city government and hotel investments, and accepted unsolicited offers of money. The circumstances demonstrate that they were offered substantial sums for their "friendship," that they considered the project in the city's best interests, and that they were made to believe that the sheik would not invest in Philadelphia unless he were permitted to "buy friends." In essence, the government's case is that the defendants consummated the crime by accepting money for friendship. Receiving money under these circumstances, whatever its relevancy to prove extortion, was insufficient as a matter of law to prove predisposition. The government has demonstrated convincingly that it has massive resources to encourage and inveigle local officials to commit crimes; that if sufficiently attractive monetary and civic inducements are dangled, there are fish who will bite. It does not demonstrate that the fish were predisposed to take the bait.

Viewing the government's case most generously, as we must, no finder of fact could reasonably infer beyond a reasonable doubt that the defendants were predisposed, given the circumstances of massive inducement established by the government's proof. Accordingly, I agree with Judge Fullam's determination that the government failed to present sufficient evidence of predisposition to submit the entrapment issue to the jury. I have made "due allowance for all reasonably possible inferences" favoring the government's case, but I must conclude that to accept the jury's verdict would be to allow "mere speculation . . . to do duty for probative facts." *Galloway v. United States*, 319 U.S. 372, 395 (1943).

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[24] *See generally* Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957, 958-60 (1974).

IV.

The majority's clever approach to this very sensitive problem is a tribute to the skilled advocate's art. Set forth in Part III of their opinion, it is an unrelenting exhortation of major and minor premises that has an uncanny resemblance to mechanical justice. I do not fault its syllogistic structure; I quarrel only with the choice of major premises. I fault the majority's refusal to take as a beginning point the critical issue in any case where, as here, there is evidence of government inducement: Did the prosecution make out a *prima facie* case of *predisposition* on the part of the defendants beyond a reasonable doubt so as to merit submitting the entrapment question to the jury?

Instead, the majority have turned our American criminal justice system upon its head and reversed the burden of proof: Instead of requiring the government to prove that the issue was properly submitted to the jury, they demand proof from the defendants that it should not have been. Thus, the majority's approach, ringing and singing, is a classic example of the fallacy of *ignoranti elenchi*, or irrelevance.[25] Instead of proving point A, the defendants' predisposition, their argument proves unrelated point B, a rebuttal of factors which the district court considered in setting aside the verdict. In the scholastic rhetorical sense, the majority's obligation was to present a *confirmatio* of the government's proof, not a *refutatio* of isolated contrary contentions.

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[25] W. Sahakian & M. Sahakian, Ideas of the Great Philosophers 16 (1966).

Thus, the major discussion of this very important issue, set forth at great length in Part III of the majority opinion, consists only of a refutation of what is described as the district judge's three stated reasons for his post-trial decision. Having rebutted these reasons, albeit skillfully, the majority rest their case. At most, however, what the majority have done, incident to refuting the benignity of the payments, is to prove a theory of extortion. They have not demonstrated how the government met its burden of proving defendants' predisposition to commit the offense. I can accept every iota of the majority's analysis in Part III and still conclude that their analysis passes wide of the relevant mark. The majority have proved that the amount of the money offered is no defense to extortion because city councilmen should have known better, III A; that there was no "benignity" of the payments, III B; and that Schwartz and Jannotti accepted the money, III D. Of the four items discussed by the majority in Part III, the only factual component relevant to the issue of pre-disposition was the "Arab mind" factor, Part III C.

The majority observe:

> After being carefully and specifically instructed on the significant factual issues in this case, the jury found the defendants guilty, thereby rejecting the entrapment defense. Its verdict represents a finding that, based on the totality of the evidence, including the observations by the jury of the actions, words, voice inflections and mannerisms of the defendants and the F.B.I. agents, the defendants were predisposed to engage in political corruption. The jury's verdict also represents a rejection of the notion that appellant Schwartz believed

> the $30,000 payment was a "consulting fee", as well as a rejection of the argument that the defendants were led to believe that the payment of money was simply to enable the representatives to report back to the sheik that they had made friends in accordance with the "Arab way" of doing business. Finally, it represents a rejection of defendants' argument, accepted by the district court, that the defendants were led to believe that unless they took the payments the hotel project would not come to Philadelphia.

Majority Opinion typescript at 54.

The majority thus conclude:

> The ultimate factual decisions in an entrapment case must be left to the jury. Where, as here, the jury was uniquely equipped to inquire into the calculus of human interaction, a court should not interfere with its conclusions. We conclude that in determining that defendants were entitled to a judgment of acquittal on the ground of entrapment as a matter of law the district court impermissibly substituted its own determination of the credibility of witnesses, the weight of the evidence and the inferences to be drawn from the evidence for that of the jury.

Id. at 55.

The last quoted sentence distills the basic division in this court which, at bottom, is a disagreement over the assignment of competences between judge and jury. To decide whether a jury question was presented, one must assume the credibility of the opposing witnesses; no contest was presented here as to credibility and, therefore, there was no need to go to the jury on that issue. As to the weight to be given to the evidence, that can relate to one of two factors: credibility, where it is placed in issue (and here it was not); or to the standard of proof beyond a reasonable doubt. In the latter situation, the judge — and not the jury — first makes this legal determination, and he must draw all reasonable inferences in favor of the prosecution. I suggest that this is the test that should have been applied — not to a solitary excerpt from Judge Fullam's explanation — but to all the evidence produced on the issue of whether the defendants were disposed to commit the acts absent the inducement of the government. The majority have accurately described the standard of review of a judgment n.o.v., Majority Opinion typescript at 39, but they then proceed to apply a newly formulated standard wherein they examine not the entire record, but only the evidence relevant to the district court's statement of why it set the verdict aside. *See id.* They thus substitute for a major jurisprudential hurdle less imposing hurdles that they can leap with facility.

Popular opinion may not care greatly about the fates of those entrapped and convicted by the government and its *agents provocateur*, but federal judges must care about the sword that is plunged into the body of trust between a people and their government. That body can withstand only so many wounds before its life will be no more. Thus, I have set forth an extended discussion of the jurisprudential, case law, and common sense.[26] reasons why I cannot tolerate what the majority do today. Speaking as if no large questions were involved, they will relegate to the jury the resolution of conflicting societal interests, a resolution that in the tradition of judicial courage belongs to the judge. Moreover, they justify it all in an argument built upon irrelevancy. The fundamental interests of justice in a free society deserve better. Therefore, I respectfully but vehemently dissent.

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[26] "Common sense" as used here is not a makeweight. In this adjudication it is meant to be what judges perceive to be contemporary standards of received values.

V.

I turn now to the question of the district court's jurisdiction under the Hobbs Act. The jury found both defendants guilty under Count III of the indictment of conspiracy to obstruct interstate commerce in violation of the Hobbs Act, 18 U.S.C. §1951.[27] Indeed, this was the only basis of Jannotti's conviction. The district court set aside the verdict and dismissed Count III of the indictment, reasoning that the Act "does not operate to confer federal jurisdiction over purely hypothetical potential impacts on commerce which could never occur." 501 F.Supp. at 1185. I agree, and I therefore contend that, in addition to the entrapment defense, the judgment of acquittal on Count III should be affirmed for this separate reason.

I begin the Hobbs Act analysis with the familiar precept that federal courts are courts of limited jurisdiction.[28] Federal district courts are established by Acts of

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[27] The Hobbs Act reads in pertinent part as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. §1951(a). The statute defines "commerce" as

> commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Id. §1951(b)(3).

[28] The majority fault the defendants for not citing a "policy reason for us to accept their restrictive view of Congress' constitutional power to legislate as to conspiracies which pose a threat to interstate commerce." Majority opinion typescript at 30. There are, of course, several answers to this. First, it is the burden of the pros-

Congress and their jurisdiction is created solely by Congress. The majority have set forth the basic theme that the Hobbs Act definition of interstate commerce is coextensive with the constitutional definition. Majority Opinion typescript at 23-24. But some interference with or effect on interstate commerce, however minimal, is a jurisdictional element of a Hobbs Act offense, in the sense that a robbery, extortion, attempt, or conspiracy that has no contact with interstate commerce is beyond the subject matter competence of the district court. *United States v. Mazzei*, 521 F.2d 639, 642 (3d Cir.)(in banc), *cert. denied*, 423 U.S. 1014 (1975); *United States v. Staszcuk*, 517 F.2d 53, 59-60 (7th Cir.)(in banc) (Stevens, J.), *cert. denied*, 423 U.S. 837 (1975). *Cf. United States v. Feola*, 420 U.S. 671, 694-96 (1975) (presence of a federal officer necessary to establish federal jurisdiction over a conspiracy to violate 18 U.S.C. §111, which prohibits assaults on federal officers).

The majority rely on two decisions from the Seventh Circuit that appear to represent the frontiers of Hobbs Act jurisdiction in the federal courts today, *Staszcuk* and *United States v. Rindone*, 631 F.2d 491 (7th Cir. 1980) (per curiam).[29] Accepting the precepts there announced

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ecution to prove jurisdiction; not the burden of the defense to disprove it. Second, the issue is not a question of expansive or restrictive views of Congress' constitutional powers. Rather, giving Congress the maximum of constitutional power, can there be a vesting of federal jurisdiction without proof by the government of one iota of actual or potential effect on interstate commerce? Third, the "policy" sought by the majority is inherent in the Commerce Clause itself, which creates the legislative power; and that clause at its most broad interpretation, has never been construed to extend federal power over effects on commerce that are merely hypothetical, fanciful, or imaginary. In sum, giving Congress maximum constitutional power to interpret the interstate commerce clause does not mean giving Congress the power to abolish the clause.

[29] Because *United States v. Rose*, 590 F.2d 232 (7th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979), does not consider an issue of federal jurisdiction, it is irrelevant.

I conclude that the evidence presented by the government at trial failed to demonstrate the necessary "realistic probability that an extortionate transaction will have some effect on interstate commerce." *Staszcuk,* 517 F.2d at 60. In *Staszcuk* the defendant city councilman received $3,000 from a private individual and subsequently did not oppose a zoning change permitting construction of an animal hospital. After receiving bids from three contractors, however, the donor of this largesse changed his plans and used his land in a manner permitted by the unamended ordinance. The defendant contested federal jurisdiction, and the government presented the testimony of one of the contract estimators that construction of the animal hospital would have required the use of components manufactured outside the state. Determining that "a threatened effect on interstate commerce is sufficient to bring the statute into play notwithstanding the absence of any actual effect," *id.* at 59, the court focused its inquiry on the situation at the time of the offense, found a potential effect on commerce, and held that "jurisdiction . . . is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce." *Id.* at 60. Judges Sprecher, Swygert, and Pell dissented, finding potential effects insufficient to create federal jurisdiction.

In *Rindone,* a municipal inspector extorted payments from an electrical contractor by threatening to prosecute code violations and thus force the contractor out of business. Defendant Rindone argued that because the FBI supplied the money paid him by the contractor "no depletion of the payor's assets was possible and thus the nexus with interstate commerce [was] not sufficient to invoke Hobbs Act jurisdiction." 631 F.2d at 492. Following *Staszcuk,* the court focused on the situation at the time of the offense and held that when Rindone acted — at the time he demanded payment, before the actual transfer of money and before the contractor spoke to the FBI — there was a realistic probability that the contractor's assets would be depleted by the extortionate transaction. *Id.* at 493-94.

Under these two cases, relied upon by the majority, the test is whether the government introduced sufficient evidence, or any evidence at all, demonstrating the *sine qua non* of federal Hobbs Act jurisdiction: "a realistic probability that [the Arab scheme] will have some [real and not fanciful] effect on interstate commerce." I have added the words "real and not fanciful" to the Seventh Circuit formulation in order to emphasize its conformity to the Hobbs Act jurisdictional requirements that our court has previously announced: "adequate evidence to establish that there was *some* effect on commerce," *United States v. Cerilli*, 603 F.2d 415, 424 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980). *See Mazzei*, 521 F.2d at 642. I find no such evidence on this record. The government relies on an apparent jury finding "that the extortionate scheme, *as perceived by defendants*, would have affected interstate commerce. . . . The hotel *was believed to be* a multi-million dollar investment, and substantial amounts of money and goods and services would have moved in interstate commerce as a result of its construction." Brief for Appellant at 28 n.10 (emphasis added). The argument obliquely concedes that the fantasies of federal agents cannot alone create federal jurisdiction, but then moves without logical support to a conclusion that belief by a listener can somehow convert a speaker's fancy into fact. I reject the government's theory that building castles in the air somehow confers federal jurisdiction on the ground.[30]

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[30] The government synthesized its contention at the first oral argument before the panel:

> MR. FIORAVANTI: If the listener to the fairy tale accepts the facts as true and undertakes to become involved in a criminal conspiracy relying on those facts, then his agreement in-

Without a modicum, or at least a scintilla, to be very generous, of "*some* effect on commerce," the door to the federal courthouse simply cannot be opened. The Supreme Court made this crystal clear in *Feola,* when it emphasized that, regardless of the defendant's perception, the victim was indeed a federal officer and that was the operative fact investing federal jurisdiction. Thus, the court explained:

> The jurisdictional requirement is satisfied by the existence of facts tying the proscribed conduct to the area of federal concern delineated by the statute. Federal jurisdiction always exists where the substantive offense is committed in the manner therein described, that is, *when a federal officer is attacked*. Where, however, there is an unfulfilled agreement to assault, it must be established whether the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction. If the agreement calls for an attack on an individual specifically identified, either by name or by some unique characteristic, as the putative buyers in the present case, and *that specifically identified individual is in fact a federal officer,* the agreement may be fairly characterized as one calling for an assault upon a federal officer, even though the parties were unaware of the victim's actual identity and even though they would not have agreed to the assault had they known that identity. Where the object of the intended attack is

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NOTE — *(Continued)*

volved the violation of federal law even though the facts turn out to be a misperception. Because impossibility is no defense.

JUDGE ALDISERT: How does this believing have an effect on interstate commerce?

MR. FIORAVANTI: It does not, in fact, Your Honor.

Transcript of oral argument at 31-32.

> not identified with sufficient specificity so as to give rise to the conclusion that had the attack been carried out the victim would have been a federal officer, it is impossible to assert that the mere act of agreement to assault poses a sufficient threat to federal personnel and functions so as to give rise to federal jurisdiction.

420 U.S. at 695-96 (emphasis supplied).

The essential flaw in the majority's opinion is its failure to appreciate the jurisdictional nature of the commerce element in a Hobbs Act case. The majority interweaves its jurisdictional argument with the argument that factual impossibility of completing a substantive offense does not bar a conviction of conspiracy. They confuse *proof* of the crime of conspiracy with the jurisdictional *power* to punish the crime. The presence of subject matter jurisdiction is a discrete and primary issue in each case presented to a federal court, unlike a state court. The effect on commerce is both jurisdictional and substantive in a Hobbs Act prosecution, but the two inquiries are separate and distinct. *See, e.g., Feola*, 420 U.S. at 694-96. The majority have accepted the government's straw man argument that impossibility is no defense to crime of conspiracy. Even if I could in the exercise of judicial patience, tolerate a litigant's aggrandizement of irrelevancies, I must object to the majority's agreement to join the government in demolishing the straw man.

I can imagine "the persons of the dialogue," in the form of Socrates and Crito:

> Soc.: Is there federal jurisdiction?
> Cr.: Yes, there is federal jurisdiction.
> Soc.: How is there federal jurisdiction?
> Cr.: There is federal jurisdiction because factual impossibility of performing a conspiracy is no defense to a charge of conspiracy which may be brought when there is federal jurisdiction.

In terms of formal logic, how does one analyze this synthesis of the government's argument, which, nodding like Homer, the majority have accepted? To borrow from Lord Devlin, "I confess that I approach the investigation of this legal proposition with a prejudice in favour of the idea that there may be a flaw in the argument somewhere."[31]

Two such flaws quickly leap to the surface. Obviously, it is a *non sequitur*. More unfortunately, the reasoning "cooks the books," to use Professor Neil MacCormick's phrase,[32] or more popularly, it puts the bunny in the hat by begging the question in a classic *petitio principii:* Instead of *proving* the conclusion (presence of federal jurisdiction), the argument *assumes* it and then argues substantive law: factual impossibility as a defense to the conspiracy charge. The fundamental issue of this court's jurisdiction deserves a more serious, rational analysis.

I conclude with the district court that the evidence did not establish federal jurisdiction. The Hobbs Act contemplates conspiracies that have at least a realistic probability of affecting interstate commerce. A purely hypothetical effect, a fairy tale conjured by the FBI's answer to the Brothers Grimm, is not "a sufficient threat to [commerce] so as to give rise to federal jurisdiction." *Id.* at 695. *Cf. United States v. Archer,* 486 F.2d 670, 681-82 (2d Cir. 1973) (Friendly, J.) (Travel Act, 18 U.S.C. §1952, does not apply when federal officers supply the interstate element and act to ensure that an interstate element will be present for the purpose of transforming a local bribery offense into a federal crime).

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[31] *St. John Shipping Corp. v. Joseph Rank,* [1957] 1 Q.B. 267, 282.

[32] N. MacCormick, Legal Reasoning and Legal Theory 72 (1978).

VI.

Because of the view I take, I do not reach the due process and manufactured jurisdiction issues addressed by the majority.

VII.

To avoid unduly prolonging an opinion that is already too lengthy, I will not discuss in detail the majority's treatment of the "extortion under color of official right" argument, set forth in Part IIB of the majority opinion, other than to assert my continued disagreement with both the majority's conclusion and its supporting reasoning. I adhere to the views set forth in *United States v. Cerilli*, 603 F.2d 415, 426 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980) (Aldisert, J., dissenting), where I identified and analyzed the serious error this court committed in *United States v. Kenny*, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972), in its revolutionary interpretation of the Hobbs Act. I introduced my discussion as follows:

> It is now my view that our interpretation in *Kenny* and its progeny is not supported by the legislative intent underlying the Hobbs Act nor is it historically accurate. I believe that our failure to reexamine its rationale has resulted in a perpetuation of erroneous law not only in this circuit but in the First, Second, Fourth, Seventh, Eighth and Tenth Circuits which have followed our lead without setting forth a reasoned elaboration for their conclusions.

603 F.2d at 427 (footnotes omitted). Moreover, I demonstrated how Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo. L.J. 1171 (1977), effectively demolished the underlying theory that we accepted for our rule when we improperly accepted the analysis set forth in

Stern, *Prosecution of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion,* 3 Seton Hall L. Rev. 1 (1971). I adhere today to every word I set forth in my *Cerilli* dissenting opinion and for this separate reason would affirm the judgments of acquittal on Count III.

VIII.

To be such a dissentient as I have been today amidst a college of respected peers, whose views I always respect, and much more often than not share, is not to present an animadversion of the majority's approach to this important case. Rather, I have attempted to demonstrate that this sensitive intersection between morality and positive law implicates sincerely held but diverse conceptions of justice.

> Whatever one's own beliefs, one lives among human beings in a community or various communities. One's fellows have, and one knows they have, moral attitudes towards and moral expectations of oneself, which reflect their moral principles and, perhaps, rules — their "moral code." It would take exceptional and not necessarily commendable tough-mindedness to ignore or show indifference to these attitudes and expectations.[33]

In admitting to a Humean philosophy, I believe that our moral, like our legal, life has a necessary social and experiential setting. It is this which stocks our vast inventory of standards of societal conduct — legal rules or principles — "in the context of which we can frame and test new principles of action in new or difficult circumstances."[34]

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[33] N. MacCormick, Legal Reasoning and Legal Theory 274 (1978).

[34] *Id.* at 124.

The choice or construction of normative principles from this inventory is what divides our court today. As a full court we have faced the responsibility of choosing between rival models for, rival patterns of, law enforcement in our society. We have attempted to do justice according to law, not justice in the raw. We diverge only on what is meant by "according to law." Because I agree with the result reached by Judge Fullam, I would affirm the judgment of acquittal.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 80-166

UNITED STATES OF AMERICA

v.

HOWARD L. CRIDEN, et al.

MEMORANDUM AND ORDER

FULLAM, *J.* AUGUST 18, 1980

The Indictment in this case may be summarized as follows:

Count One charges the defendant Criden with conducting the affairs of an enterprise (his law firm) through a pattern of extortionate activity in violation of 18 U.S.C. § 1962(c) (the "RICO" statute).

Count Two charges all four of the defendants with conspiracy to violate the RICO statute, under 18 U.S.C. § 1962(d).

Count Three charges all four of the defendants with Hobbs Act conspiracy; 18 U.S.C. § 1951(b).

The remaining counts charge substantive violations of the Hobbs Act, under 18 U.S.C. § 1951 and 18 U.S.C. § 2. Count Four charges the defendants Criden and Johanson, Count Five Criden and Schwartz, and Count Six charges the defendants Criden and Jannotti.

All of the defendants seek dismissal of the Indictment on the ground that massive and prejudicial publicity tainted the grand jury proceedings, and on the ground that prosecution is impermissible because of alleged prosecutorial misconduct.

All of the defendants also seek dismissal of the Hobbs Act counts on jurisdictional and substantive grounds; and the defendant Jannotti also seeks dismissal of Count Two, as to him, on substantive grounds.

All of these contentions will be discussed *seriatim*.

FACTUAL BACKGROUND

In the latter part of 1978, F.B.I. agents in the Eastern District of New York undertook a "sting" operation which has come to be known as "Abscam." Undercover F.B.I. agents and paid informants with extensive experience in various criminal enterprises set themselves up as purported representatives of wealthy Arab investors seeking worthwhile investments in this country. The operation was conducted under the general supervision of the Organized Crime Strike Force in the Eastern District of New York, headed by Thomas Puccio, Esq. The undercover operatives purported to engage in business under the name Abdul Enterprises, Inc., supposedly owned by the Arab investors.

Initially, the purpose of the undercover operation was to locate stolen art objects and fraudulent certificates of deposit and other securities, with a view toward prosecuting the persons involved in such crimes. After achieving some limited success in those areas, and perhaps as a result of leads developed during the early stages of the operation, the investigators turned their efforts toward official corruption of various kinds: possible corruption in connection with zoning and licensing matters in Florida; possible corruption and organized crime infiltration in connection with casino licensing in Atlantic City, New Jersey;

possible corruption on the part of congressmen and immigration officials in connection with immigration matters; and, by late 1979, possible corruption on the part of public officials of the City of Philadelphia in connection with zoning matters and port-development matters. The processes by which this transition occurred, and the manner in which the entire operation was conducted, are challenged by the defendants in their pending dismissal motions.

The defendants Criden and Johanson are lawyers, and were partners in a Philadelphia law firm. They represented a client who held an option on a valuable piece of property in Atlantic City, and who was interested in constructing a casino on that site. The attorneys were seeking financing for the project. Through Mayor Angelo Errichetti of Camden, New Jersey, they were introduced to the undercover agents, and were led to believe that the (fictitious) Arab investors might well be willing to provide the necessary financing.

In the course of a meeting in Florida to discuss the casino project, in circumstances not yet fully developed on the record, Criden and Errichetti were given to understand that the Arab investors would be willing to pay substantial sums of money to members of Congress for assistance in resolving any problems with the Immigration and Naturalization Service which might arise, should the Arab investors desire to gain permanent residency in this country. According to the Government, Criden thereafter became involved in arranging meetings between the undercover agents and various members of Congress to whom bribes were paid; Criden allegedly received substantial fees for arranging such meetings. Four members of Congress, and both Criden and Errichetti, have been indicted in the Eastern District of New York on charges stemming from these alleged activities. As this

Memorandum is being written, trial on one of these indictments is now under way in that district.

In early January 1980, the remainder of the Abscam operation was transferred from New York to Philadelphia, where local aspects of the investigation came under the supervision of the Philadelphia F.B.I. office and the United States Attorney for this district, Peter Vaira, Esq. (Throughout most of the Abscam investigation, United States prosecutors in various districts, most notably Philadelphia and New York, had been coordinating their efforts; it turned out that most of the alleged corruption being investigated was centered in Philadelphia and New Jersey.)

In Philadelphia, the "scenario" presented by the undercover agents was that the Arab investors had decided to construct a multi-million-dollar hotel project in Philadelphia, and would also be interested in major port improvements in the City, in connection with a major effort to revitalize the coal industry in Pennsylvania. Criden was asked to arrange meetings with City officials whose "friendship" could be purchased by the Arabs in order to resolve any zoning problems or other problems with local government which might arise in connection with the hotel project. The Indictment charges that Criden arranged meetings between the undercover agents and the other three defendants, all of whom are members of the Philadelphia City Council, and all of whom are alleged to have accepted bribes from the undercover agents in exchange for pledges of assistance. These alleged activities, meetings, and payments form the basis for the charges set forth in the Indictment in this case.

THE EVIDENTIARY RECORD

All of the meetings and conversations between the undercover agents and the defendants which directly pertain to the Philadelphia aspect of the Abscam investigation were electronically recorded or video-taped. The transcripts have been made a part of the record for purposes of the present ruling, and the Court has also viewed the pertinent video tapes and listened to various electronic recordings. The Court has reviewed the entire transcript of the grand jury proceedings, and has required disclosure of relevant portions of these transcripts to the defense. The Court has also reviewed *in camera* certain other materials: the Blumenthal Report, stemming from the investigation conducted by the Department of Justice into the premature disclosures of the investigation to the press; a pre-prosecution memorandum prepared by Mr. Puccio; and a memorandum submitted to the Attorney General of the United States by the United States Attorney's office in New Jersey (the "Del Tufo Memorandum"). None of these latter memoranda has been disclosed to the defendants. Counsel for the Government has copies of the Puccio and Del Tufo memoranda, but has not seen the Blumenthal Report. The Court has also listened, in camera, to certain untranscribed recordings of conversations between an F.B.I. informant and a certain Florida official, for purposes of determining whether these recordings should be disclosed to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963). The Court has also reviewed a transcript of the testimony of a now deceased witness before the New York grand jury, for the same purpose.[1]

The Court has also conducted several days of hearings, at which extensive oral testimony was presented.

PREJUDICIAL PUBLICITY

Disposition of this aspect of the defense motion has been anticipated in this Court's Memorandum of July 25,

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[1] Only those materials made available to counsel have been considered in reaching the decisions announced in this Memorandum.

1980. As noted in that Memorandum, the Government's admitted responsibility for the premature and excessive press coverage of the Abscam investigation and its consequences, while unfortunate and not to be condoned, simply does not amount to a violation of due process of law. I have carefully examined the transcript of the grand jury proceedings, and have found nothing to suggest that the media barrage had any impact upon those proceedings. Indeed, every effort was made to ensure that the grand jurors had not been and would not be influenced by the extensive press coverage; and these efforts appear to have been successful. In short, no prejudice to the defendants has yet been shown. Indeed, an argument can be made that the media barrage has been at least as harmful to the Government's efforts as to the interests of the defendants.

If an untainted trial jury can be convened, the defendants will have no ground for complaint. That issue must be determined at trial. And, if a fair trial cannot be assured in this district, there are several alternatives short of dismissal which might be pursued without doing violence to the due process rights of the defendants.

Prosecutorial Misconduct

The defendants seek dismissal of the Indictment on the ground of prosecutorial overreaching amounting to a violation of due process of law. They contend not only that the defendants' due process rights would be violated by permitting the case to proceed to trial, but also that, in the exercise of its supervisory authority over the administration of criminal justice, the Court should decline to sanction the methods employed by the investigators in this case.

The defendants assert that persons for whose conduct the prosecution is accountable intentionally caused the premature and excessive media coverage of the Abscam investigation, in order to stampede the grand jury into returning the Indictment, and in order to preclude responsible officials in the Justice Department from declining to prosecute. However, the principal thrust of the defense argument is that the methods employed by the prosecutors and their investigators were shocking and outrageous, and should not be tolerated. This latter argument raises issues which are akin to, but different from, the defense of entrapment.

If, as seems inevitable in this case, the evidence at trial sufficiently shows that the defendants were induced by F.B.I. agents to commit the crimes charged, the burden will be upon the Government to prove beyond a reasonable doubt that the defendants were predisposed to commit the offenses. *Sherman v. U.S.*, 356 U.S. 369 (1958); *Sorrells v. U.S.*, 287 U.S. 435 (1932); *U.S. v. Russell*, 411 U.S. 423 (1973); *Hampton v. U.S.*, 425 U.S. 484 (1976); *U.S. v. Watson*, 489 F.2d 504 (3d Cir. 1973); *U.S. v. Shoup*, 608 F.2d 950 (3d Cir. 1979); *U.S. v. Levin*, 606 F.2d 47 (3d Cir. 1979). The cited decisions stand for the proposition that ordinarily, at least in contraband cases, and perhaps in all cases involving so-called "victimless" crimes, the defense of entrapment is not available to a defendant who can be shown to have been predisposed. Whatever may be the ramifications of the entrapment defense in the factual context of this case, it is clear that entrapment issues are to be resolved at trial, and the defendants do not argue otherwise.

However, a majority of the Supreme Court in *Hampton v. U.S.*, *supra,* have expressed the view that a due process defense, based on outrageous law enforcement conduct, is available, and is not defeated by evidence of the defendant's predisposition. The Third Circuit Court of Appeals has so held; *U.S. v. Twigg*, 588 F.2d 373 (3d

Cir. 1978), and Judge Friendly has expressed a similar view for the Second Circuit Court of Appeals. *U.S. v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973).

In *Twigg*, the creative involvement of government agents in the criminal activity charged to the defendant was so extensive and pervasive as to lead the court to conclude that, in reality, the crime was committed by the Government with only marginal and incidental involvement on the part of the defendant. In *Archer*, the court expressed disapproval of an undercover operation in which government agents committed a series of independent crimes in order to lend credibility to their undercover pretenses.

In the present case, in addition to the publicity issue mentioned above, the defendants argue that independent crimes by the paid informants were sanctioned or condoned. However, their principal challenge is that the undercover agents went to outrageous and excessive lengths in inducing the defendants to become involved.

The alleged independent criminal activity on the part of the undercover informants appears to have been remote, both temporally and geographically, from the investigative activities leading up to the present Indictment. It certainly was not authorized, and probably was not condoned, by any government agent. The due process rights of these defendants were not affected thereby. This factor is entitled to little, if any, weight in the exercise of whatever discretionary power the Court may have over the administration of criminal justice, as it relates to this case.

It is not at all clear that excessive inducement, as an issue of due process, can successfully be disentangled from the entrapment defense. In any event, it cannot be ruled upon at this time, for at least two reasons:

1. While the present record includes the electronic recordings of all meetings between the undercover agents

and the defendants, the record does not disclose the communications which preceded these meetings. Apparently, Criden was the emissary, but the record does not disclose what representations he may have made to the other defendants. Moreover, each defendant's perception of the situation assumes critical importance. In my view, it is simply impossible to resolve the due process issues raised here without the defendants' testimony. I do not mean to suggest, necessarily, that the defendants must testify at trial in order to avail themselves of an entrapment defense. I mean simply that, in order to obtain pretrial dismissal of the Indictment on due process grounds, the actual impact of the alleged overreaching upon each defendant must be shown, and cannot be merely surmised.

2. Even on the present record, it cannot be said that the facts are undisputed. *U.S. v. Graves,* 556 F.2d 1319 (5th Cir. 1977) stands for the proposition that the defense of alleged governmental misconduct can properly be resolved on a pretrial motion (556 F.2d at p. 1322); *see also U.S. v. Quinn,* 543 F.2d 640, 647-48 (8th Cir. 1976). However, the First Circuit Court of Appeals has expressly left open the question whether factual disputes concerning the alleged misconduct are to be resolved by the trial judge or by the jury. *U.S. v. Johnson,* 565 F.2d 179, 181-82 (1st Cir. 1977). And in this circuit, the opinion in *Twigg, supra,* includes this *caveat:*

> "When the facts concerning the nature of the police conduct are disputed, it is unclear whether a jury resolution of the issues is required prior to a ruling by the court. *See U.S. v. Johnson, supra,* 565 F.2d at 181. As the facts in the instant case are uncontested, we need not decide this question." (588 F.2d at p. 379, n.8.)

In view of these uncertainties, the preferable course is to defer resolution of the due process issue until trial. Concurrent, independent resolution of the disputed facts by the judge and the jury would presumably provide a basis for resolution of the procedural problem.

THE DEFENDANT JANNOTTI'S MOTION TO DISMISS COUNT TWO

I am satisfied that Count Two of the Indictment is not facially defective insofar as it pertains to the defendant Jannotti. His Motion to Dismiss that count, in the final analysis, merely asserts that the Government will be unable to sustain its burden of proof. That issue must await trial.

THE HOBBS ACT COUNTS

The Hobbs Act, 18 U.S.C. § 1951(a), provides for the conviction of

> "whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do. . . "

In subsection (b)(2), the term "extortion" is defined to include

> "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

The fourth, fifth and sixth counts of the Indictment in this case charge the various defendants with substantive violations of the Hobbs Act. In each count, it is charged that specified defendants

> "did knowingly and willfully attempt to obstruct, delay and affect commerce . . . by extortion . . . by obtaining and causing to be obtained money . . . which was not lawfully due the defendants, from Michael Wald and Ernest Haridopolis, with their consent, which consent was induced under color of official right."

In the third count, all four defendants are charged with conspiring to violate the Hobbs Act, in that they

> "did knowingly, willfully, and unlawfully conspire and agree with one another, and with other persons . . . to commit extortion as that term is defined in Title 18, United States Code, Section 1951(b)(2), which extortion would affect commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), and the movement of supplies and other materials, equipment, services and labor in commerce"

in that

> "it was part of the conspiracy that [the defendants] would obtain and cause to be obtained money . . . which was not lawfully due the defendants, from Michael Wald and Ernest Haridopolis, with their consent being induced under color of official right."

Counts Three through Six are facially valid, and adequately charge the defendants under the Hobbs Act. However, the unusual facts of this case—established beyond dispute in the course of pretrial hearings, and, indeed, conceded by the Government—present very serious questions as to whether the charges embraced in Counts Three through Six are within the jurisdiction of any federal court. Specifically, the question is whether there exists the required nexus with interstate commerce.[2] The victims of the alleged extortion in this case, Messrs. Wald and Haridopolis, were F.B.I. agents acting in an undercover capacity. They purported to be representing wealthy Arab investors interested in constructing a multi-million-dollar hotel project. The defendants were allegedly bribed to obtain their pledges of assistance in resolving any zoning problems which might arise and to ensure that the proposed project would not encounter any difficulties with local governmental authorities. The Arab investors, and the proposed hotel project, were entirely imaginary.[3] All of the "cover" arrangements which lent credibility to the agents' pretenses were made by F.B.I. agents, and were paid for with Department funds. The Justice Department itself was also the source of the funds allegedly used to bribe the defendants.

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[2] A further possible problem, whether extortion "under color of official right," for Hobbs Act purposes, encompasses mere bribery, or whether some degree of coercion must be shown, appears to have been settled, in this circuit, in favor of the broader definition. *U.S. v. Kenny*, 462 F.2d 1205 (3d Cir. 1972); *U.S. v. Mazzei*, 521 F.2d 639 (3d Cir.) (*en banc*), *cert. denied*, 433 U.S. 1014 (1975); *U.S. v. Cerilli*, 603 F.2d 415 (3d Cir. 1979). But *see U.S. v. Addonizio*, 451 F.2d 49, 72 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); and Judge Gibbons' dissenting opinion in *Mazzei* and Judge Aldisert's dissenting opinion in *Cerilli*. Needless to say, this Court is bound by the prevailing view of this circuit. Moreover, I suspect that in most instances in which a public official wrongfully obtains money under color of official right, some degree of coercion is present.

[3] In earlier, related aspects of this "sting" operation (commonly referred to as "Abscam"), undercover agents professed to be representing a business entity, Abdul Enterprises, Inc., supposedly owned by the wealthy Arab investors. While this fictitious corporation appears not to have been mentioned in their dealings with these defendants, it may be that the undercover agents here involved should be regarded as professing to act on account of Abdul Enterprises, Inc. Be that as it may, the fact is that no corporation by that name ever existed.

The reach of federal jurisdiction under the Hobbs Act is indeed extensive. The Supreme Court has concluded that the Act reflects a Congressional intent "to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. U.S.*, 361 U.S. 212, 215 (1960). It follows that federal prosecution is permissible whenever there is any actual impact, however minimal, upon interstate commerce, *U.S. v. Cerilli, supra, U.S. v. Spagnolo*, 546 F.2d 1117, 1119 (4th Cir. 1976) *(per curiam), cert. denied,* 433 U.S. 909 (1977); or whenever, notwithstanding the absence of any actual impact on interstate commerce, potential impact can be shown. *U.S. v. Staszcuk*, 517 F.2d 53 (7th Cir.) *(en banc), cert. denied,* 423 U.S. 837 (1975). And it is not necessary to show that defendants intended to affect interstate commerce:

> "It is not necessary that the *purpose* of the extortion be to affect interstate commerce . . . but only that one of the *natural effects* thereof be an obstruction of that commerce." *U.S. v. Addonizio,* 451 F.2d 49, 77 (3d Cir. 1971), *cert. denied,* 405 U.S. 936 (1972).

Although a principal purpose of Congress in enacting the Hobbs Act was to protect interstate commerce from racketeering activities, it is not necessary to establish that the defendant's activities constituted racketeering, if they fall within the proscriptive language of the statute. *U.S. v. Culbert,* 435 U.S. 371 (1978).

In the present case, however, it is clear that there was neither actual nor potential nor threatened impact upon interstate commerce. Only two possible bases for the exercise of federal jurisdiction remain to be considered:

(1) it might be held that the transaction should be viewed from the perspective of the defendants; since they thought the bribes were being paid to smooth the way for completion of a hotel project which, had it existed, would have been engaged in interstate commerce, federal jurisdiction attaches. Or (2) it might be held that municipal bribery is likely to have some impact on interstate commerce, and that the statute reaches all conduct within that class, irrespective of actual or potential impact on interstate commerce in a particular instance. The opinion written by Judge Stevens (now Mr. Justice Stevens) for the *en banc* Seventh Circuit Court of Appeals in *U.S. v. Staszcuk, supra*, is instructive on both points:

In *Staszcuk*, a Chicago alderman was indicted for Hobbs Act extortion, for receiving money under color of official right in connection with certain proposed zoning changes. In the pertinent count, he was accused of receiving a bribe to effect a zoning change which would have permitted construction of a veterinary hospital. After the zoning change was accomplished, the veterinarian changed his mind, and the property was used for a purpose which would have been permissible under the original zoning. The sole proof of an interstate commerce nexus was testimony to the effect that, if the veterinary hospital had been constructed, it probably would have required the purchase of materials from out of state. A panel of the Seventh Circuit reversed the conviction, because of the absence of any impact on interstate commerce. The court *en banc* reinstated the conviction, however, on the theory that, at the time the bribe was received, there existed a reasonable probability of an impact on interstate commerce. The court stated:

> "There was no need to prove that the extortion was actually intended to obstruct or affect interstate commerce. The commerce element of the Hobbs Act violation is jurisdictional . . .

"We are also persuaded that the cases which uniformly hold that a threatened effect on interstate commerce is sufficient to bring the statute into play notwithstanding the absence of any actual effect, correctly interpret the Congressional purpose . . .

"This does not mean, however, that we may ignore the constitutional limits on the power of the national government. Nor may we disregard the statutory language which requires the prosecutor to prove some connection with interstate commerce in every case. We hold, however, that the commerce element of a Hobbs Act violation—the federal jurisdictional fact—may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce. Congressional concern is justified by the harmful consequences of the class of transactions to which the individual extortion belongs, and jurisdiction in the particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce.

"The jurisdictional inquiry must, of course, focus on the situation at the time of the offense. In this case the crime occurred on December 8, 1970. No actual effect on commerce occurred either before or after that date. It was, nevertheless, entirely reasonable for the jury, assessing probabilities as of that time, to find that a potential effect on commerce had been proved. The jury could reasonably infer that, as a result of the extortion on that date, there was then a likelihood that the movement across state lines of a furnace, plate glass, and plumbing and electrical fixtures would be affected . . . Contrary to the prosecutor's view, however, we do not think appellant's

> guilt or innocence may be determined entirely on the basis of the intent of the property owner or the zoning man; nor on the other hand, do we think federal jurisdiction is defeated by the fortuitous circumstance that, after the crime had been committed, a change of plans occurred and the hospital was never built." 517 F.2d at pp. 59-60.
>
> Judge Stevens appended this significant footnote:
>
> "The language of this statute does not permit us to treat it as a determination that since the class of activities giving rise to federal concern has an adverse effect on commerce, Congress intended any activity within the class to be subject to prosecution without the necessity of any showing of an actual or potential effect on commerce in the particular case." *Id.*, n. 16, p. 59.

It should be noted that certain other statutes do permit the conclusion that Congress intended to deal with a class of offenses, without regard to the impact of individual offenses upon interstate commerce. *See U.S. v. Hunter,* 478 F.2d 1019 (7th Cir. 1973) (gambling in violation of the Organized Crime Control Act of 1970); *Perez v. U.S.*, 402 U.S. 146 (1971) (loansharking, in violation of Title II of the Consumer Credit Protection Act). However, as noted by Judge Stevens, the Hobbs Act is not such a statute. *See also U.S. v. Elders,* 569 F.2d 1020 (7th Cir. 1978).

> "Courts have consistently held that the Act should be given an expansive interpretation to cover a wide range of extorti[o]nate activity. In each case, however, a nexus has been required between the extortionate conduct and interstate commerce in order to establish federal jurisdiction. That nexus

> may be *de minimis* [citations omitted], but it must nonetheless exist. Additionally, the connection with or effect on interstate commerce must have been at least a 'realistic probability' at the time of the extortionate act [citing *Staszcuk*]." 560 F.2d at pp. 1023-24.

The Government relies principally upon *U.S. v. Santoni,* 585 F.2d 667 (4th Cir. 1978), *cert. denied,* 440 U.S. 910 (1979), *U.S. v. Gambino,* 566 F.2d 414 (2d Cir. 1977), *cert. denied,* 435 U.S. 952 (1978) and *U.S. v. Brooklier,* 459 F. Supp. 476 (C.D. Cal. 1978). In *Gambino,* F.B.I. agents set up and arranged for the operation of a garbage-collection business in order to ferret out criminal activity on the part of organized crime figures; in *Santoni,* the F.B.I. set up a corporation which entered into contracts for chemical cleaning and building demolition, in order to uncover corruption on the part of employees of the City of Baltimore, Maryland, in connection with municipal contracts. Both of these cases are readily distinguishable from the present situation. In both instances, actual business entities existed and operated, and were themselves extensively engaged in interstate commerce. In *Gambino,* it was clearly established that the defendant's loansharking, extortions, and assaults had an actual and direct effect upon the garbage-collection industry in general and upon other private firms in particular. In *Santoni,* not only was the F.B.I. 'cover' firm itself engaged in interstate commerce, but the defendant's extortionate activities were shown to have direct impact upon genuine contracts with the city, which contracts required substantial out-of-state purchases. Indeed, the Fourth Circuit in *Santoni* stressed the fact that performance of the municipal contracts would have mandated interstate purchases, irrespective of the identity of the successful bidder. Moreover, it seems obvious that, in both of the cited cases, the defendants' activities affected competitors of the victim company, as well as the victim itself.

The only case cited by the Government in which the purported interstate commerce features seem to have been entirely fictional is *U.S. v. Brooklier, supra.* In that case, a firm named Forex Company was ostensibly engaged in the "sale of pornographic films to Mexico and South America." The defendants demanded a "piece of the action" and, through the use of actual and threatened force, extorted $6500 from the company. The firm was actually an undercover business established by the F.B.I., and the Government conceded that no actual effect on interstate commerce was caused by defendants' activities. The court held: (1) that the indictment properly charged an attempt to obstruct delay and affect commerce by the wrongful use of actual and threatened force; (2) that the defendants could properly be convicted of attempting to violate the Hobbs Act, notwithstanding the impossibility of actually achieving a violation; and (3) Congress intended the Hobbs Act to apply to all extortionate activity, regardless of its effect on interstate commerce. The court's opinion makes clear that the first two conclusions are squarely contrary to the views of the Third Circuit Court of Appeals in *U.S. v. Berrigan,* 482 F.2d 171 (3d Cir. 1973); the third conclusion appears to conflict with *U.S. v. Staszcuk supra.*

In *Berrigan,* the defendant was charged with attempting to smuggle letters out of a federal prison. An essential element of the completed crime in that case was lack of knowledge on the part of the warden. Actually, unbeknownst to the defendant, the warden was aware of the smuggling. The defendant was convicted of attempting to commit the crime, but the Third Circuit reversed the conviction. The court reasoned that, even though the defendant had the subjective intent to violate the law, subjective intent is not the standard: If the completed act contemplated by the defendant would not be criminal, the defendant cannot be convicted of attempt.

The *Berrigan* court meticulously analyzed the concept of intent. As I understand it, this analysis, if applied to the facts of the present case, leads to this analysis: The defendants intended to receive bribes from the two individuals named in the Indictment. If there was a realistic probability that receiving bribes from those individuals would have an impact on interstate commerce, conviction would be proper; if not, there can be no conviction, at least under the substantive counts, even though the defendants may mistakenly have believed that their actions could have affected interstate commerce.

I have concluded that the defendants cannot be convicted of attempting to obstruct commerce through extortion, as charged in the fourth, fifth and sixth counts of this Indictment. The *Berrigan* case requires that result as a matter of substantive law, and the *Staszcuk* case requires that result on jurisdictional grounds as well.

The remaining question is whether the conspiracy charge in the third count can be sustained. The general view is that impossibility is not a defense to a conspiracy charge:

> "The crime of conspiracy is complete upon the agreement to violate the law, as implemented by one or more overt acts . . . and is not at all dependent upon the ultimate success or failure of the planned scheme."

U.S. v. Thompson, 493 F.2d 305, 310 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974); *see also U.S. v. Sanford*, 547 F.2d 1085 (9th Cir. 1976). *Berrigan* was not a conspiracy case, and therefore does not preclude reliance

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upon the subjective state of mind of the defendant in the conspiracy context. And the *Staszcuk* court's discussion of Hobbs Act jurisdiction does not refer to the conspiracy problem.

If it can be established that conspirators actually intended to obstruct interstate commerce, I have no doubt that a federal prosecution for conspiracy under the Hobbs Act would be permissible. And, while the question is a close one, I am inclined to believe that, when two or more persons conspire to do an act which appears likely to have an adverse impact upon interstate commerce, they are subject to federal prosecution for conspiracy even though, unknown to them, no such impact on interstate commerce could eventuate.

The record thus far established does not rule out the existence of either type of intent on the part of the defendants. The third count, the conspiracy count, is therefore not properly subject to pretrial dismissal. The Government is entitled to an opportunity to attempt to prove at trial all of the essential elements of the charge, including the jurisdictional predicate.[4]

I recognize that there is a further problem in this case, in that the intent of the alleged conspirators can only have been based upon the representations of the government agents. The contention that this constitutes artificial creation of federal jurisdiction is not lacking in substance. *See U.S. v. Archer, supra.* But *U.S. v. Santoni, supra,* and *U.S. v. Gambino, supra,* seem to cast some doubt on the continued validity of the artificial-jurisdiction views expressed in *Archer.* This doubt, in my view, militates against pretrial dismissal.

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[4] As noted above, the facts which, in my view require dismissal of the substantive counts, are conceded by the Government. Indeed, they appear on the face of the Indictment, when read in its entirety.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 80-166

UNITED STATES OF AMERICA

v.

HOWARD L. CRIDEN, et al.

ORDER

AND NOW, this 18th day of August, 1980, it is ORDERED:

1. Defendants' Motion to Dismiss Counts Four, Five, and Six of the Indictment is GRANTED, and those counts are dismissed as to all defendants.

2. In all other respects, the defendants' Motions are DENIED, without prejudice.

3. Defendant Jannotti's Motion to Dismiss Count Two of the Indictment is DENIED.

JOHN P. FULLAM, *J.*

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 80-166

UNITED STATES OF AMERICA

v.

HARRY P. JANNOTTI
GEORGE X. SCHWARTZ

MEMORANDUM AND ORDER

FULLAM, *J.* November 26, 1980

The defendant George X. Schwartz has been found guilty by a jury of conspiring, in violation of 18 U.S.C. § 1962(d), to violate provisions of the Racketeer Influenced and Corrupt Organizations Statute, 18 U.S.C. § 1962(c) ("RICO" conspiracy), and, together with co-defendant Harry P. Jannotti, of conspiring to obstruct commerce in violation of the Hobbs Act, 18 U.S.C. § 1951(a). Before trial, both defendants sought dismissal of the Indictment on constitutional grounds, alleging various forms of prosecutorial misconduct. Extensive hearings were held, but I concluded that decision must await the further development of the record at trial. At the conclusion of the Government's case, and again at the conclusion of all of the evidence, the defendants sought judgment of acquittal pursuant to F.R.Crim P. 29, and renewed their motions to that end after the jury's verdict. This Opinion addresses both sets of motions, which to some extent involve similar or closely related issues.

I. HOBBS ACT CONSPIRACY

At all pertinent times, the defendant Schwartz was President of the Philadelphia City Council, and the defendant Jannotti was a member of City Council. The Government's evidence at trial proved that Schwartz accepted $30,000 and Jannotti accepted $10,000 from undercover F.B.I. agents who purported to be representatives of wealthy Arab investors contemplating construction of an elaborate hotel complex in Philadelphia. There is no dispute about the defendants' receipt of the payments, and the evidence permitted, although it did not compel, the inference that the payments represented bribes paid in exchange for the defendants' assurances of using their official positions to pave the way for expeditious completion of the project.

The Hobbs Act, 18 U.S.C. § 1951(a) makes criminal the conduct of

> "whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do. . . ."

The issue to be decided is whether the Government succeeded in proving the necessary nexus betwen the defendants' actions and interstate commerce. The Government introduced no evidence on that subject, arguing instead that the jury should be permitted to infer, on the basis of common knowledge, that a hotel project of the magnitude of the one under discussion (ultimately stated to be approximately $34 million) would necessarily involve interstate commerce; and that, in any event, the transfer of funds for the project by the foreign investors would fall within the definition of commerce as used in the Hobbs Act.

For present purposes, I shall assume that the evidence permitted the jury to conclude that, if the project had in fact been a genuine project, it would have required the movement of articles in interstate commerce, and that the payment of these bribes would have affected such commerce by depleting the funds available for carrying out the project. The problem which remains is that there never was any such planned project. The Arabs, their plans, and their money, were all entirely fictitious.

At an earlier stage of this litigation, by Order entered August 18, 1980, I dismissed those counts of the Indictment which charged substantive offenses under the Hobbs Act, reasoning that there was no possibility that the bribe payments could actually have affected commerce. I declined at that time to dismiss the conspiracy charge, however, on the theory that the Government might be able to prove that the defendants had an actual conscious intent to obstruct interstate commerce, and that legal impossibility of fulfillment of such intent would not be a defense to a conspiracy charge. I also left open the possibility that proof of a conspiracy to commit acts which, if completed, would affect commerce, might suffice to establish federal jurisdiction.

There is no contention that the evidence at trial proved that interference with interstate commerce was a conscious object of the alleged conspiracy. And, upon further reflection, I am now of the opinion that this Court's jurisdiction under the Hobbs Act has not been established.

The Government's position, adopted in the Court's charge to the jury, is that the matter should be viewed from the perspective of the defendants. If, as the defendants perceived the matter, the actions they conspired to carry out could realistically have had an effect on interstate commerce, the Government contends, they can properly be convicted of Hobbs Act conspiracy. I am constrained to disagree. Federal jurisdiction is not conferred by a defendant's erroneous perceptions. The criminal jurisdiction of a federal court is conferred by the laws enacted by Congress. While the jurisdictional reach of the Hobbs Act is undoubtedly extensive, touching conduct having only minimal or potential impact upon commerce (broadly defined), it does not operate to confer federal jurisdiction over purely hypothetical potential impacts on commerce which could never occur.

Another aspect of this problem should perhaps be mentioned. Extortion, as used in the statute, is defined as

> ". . . the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." (§ 1951(b)(2).)

As discussed in my August 18, 1980 Memorandum, there is some lack of unanimity among appellate decisions as to whether "consent induced . . . under color of official right" covers ordinary bribery, or whether some element of coercion is required to be shown. While it is now clear in this Circuit that the use of official position to obtain money unlawfully is covered by the Hobbs Act, all of the decisions on that subject in this Circuit involved situations in which a demand or request for payment could reasonably be perceived as having emanated from the public official. I am aware of no appellate decision, in any circuit, upholding a Hobbs Act conviction on the basis of a bribe which was neither requested by the official, nor perceived by the payor as either necessary or at least helpful. In contrast, the evidence in the present case clearly establishes that not only did the defendants not request payment, they made it very clear that the payments would not be necessary.[1]

To permit the convictions of Hobbs Act conspiracy in this case to stand would represent a substantial stretching of the definition of extortion, and a corresponding expansion of federal jurisdiction in derogation of the criminal jurisdiction of state courts. In my judgment, it is impermissible to treat federal jurisdiction thus doubly expansively: first by extending it to passive acceptance of gratuities by public officials, and second by extending it to purely hypothetical situations.

The guilty verdict on Count III of the Indictment will be vacated, and Count III will be dismissed for lack of jurisdiction.

II. Rico Conspiracy

In Count II of the Indictment, the defendants were charged with conspiracy to conduct the affairs of an enterprise, to wit, the law firm of Criden, Johanson, Dolan, Morrissey and Cook, of which co-defendant Howard Criden was a partner, through a pattern of racketeering activity, to wit, the payment of bribes to public officials.

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[1] The case of *U.S. v. Butler*, 618 F.2d 411 (6th Cir. 1980), cited by the Government, is not to the contrary, although the opinion does contain *dictum* to the effect that mere passive acceptance of a bribe by a public official can constitute extortion under the Hobbs Act, regardless of who initiates the request. Passive acceptance of a bribe can amount to tacit request for a bribe, or at least ratification of the notion that a bribe would advance the interests of the payor. The court did not address a situation involving repeated assurances by the public official that the payment was unnecessary. More importantly, the Government's evidence in that case was to the effect that the two defendants were working together, and that the kickback scheme originated with them. The "passive" receipt of a bribe expressly demanded by a co-conspirator can scarcely be regarded as truly passive.

The defendant Jannotti was acquitted on this count; the Government's own evidence tended to show that he was not even aware of the existence of the law firm, probably did not know that Howard Criden was a lawyer, and may very well have had no knowledge of bribery activities other than the single payment to him. The defendant Schwartz was convicted, and the question is whether the evidence adequately supports the verdict.

There was ample evidence that Criden engaged in a pattern of racketeering activity, that is, that he was involved in a series of bribes to public officials. And there was adequate and uncontradicted evidence to the effect that the law firm of Criden, Johanson, Dolan, Morrissey and Cook purchased supplies and equipment from out-of-state vendors, represented out-of-state clients, and acted as counsel in interstate transactions. Whether Criden's bribery activities occurred in the conduct of the affairs of the law firm is a closer question, as is the issue of Schwartz's knowing participation in a conspiracy having as its object the conduct of the affairs of that law firm.

The evidence makes clear that only three of the lawyers associated with the law firm mentioned in the Indictment had any knowledge of the illegal activities of Criden, or shared in the proceeds. Indeed, the law firm named in the Indictment appears to have been a loosely-structured, flexible arrangement, in which decisions as to whether particular fees belonged to the firm or to individual lawyers were made on an *ad hoc* basis, after the fact. Criden and Johanson received fees for their part in introducing the undercover agents to public officials who accepted bribe payments. Johanson received a bribe payment himself, and Criden both received payment from the undercover agents for his services, and, in some instances, received a portion of the bribe from the recipient of the bribe. Some of the money was distributed among Johanson, Criden and Cook, and some of it was placed in a safe deposit box to which only those three had access. On one occasion, when the law firm needed cash to meet its expenses, Criden arranged to have $2500 removed from the safe deposit box and paid to the firm, ostensibly as fees received from inactive corporations he controlled.

It is also reasonably clear that Criden, Johanson and Cook labored under the assumption that the law firm, or certain portions of the law firm, would be performing legal services for the Arabs' hotel enterprise and other business involvements in Philadelphia. Indeed, the prospect of such lucrative law business was an important part of the motivation of the three men.

Taken as a whole, I believe the circumstances established on this record permitted the jury reasonably to conclude that Criden's bribery activities were undertaken in his conduct of the affairs of the law firm. *See, e.g., U.S. v. Scotto* (2d Cir., Sept. 2, 1980), 28 Crim.L.R. 2026.

The conviction of Mr. Schwartz on Count II of the Indictment required proof that he knowingly participated in a conspiracy, one of the objects of which was Criden's conduct of the affairs of the law firm through a pattern of bribes. The defendant contends that, whereas the evidence does justify the inference that Mr. Schwartz knew that Criden was involved in at least two bribe transactions, those in which Schwartz and Jannotti received payments, the conclusion that Schwartz intended to aid Criden in conducting the affairs of Criden's law firm by that means is totally unfounded.

For many years Mr. Schwartz was a partner in a large center city law firm, which is now known as Blank, Rome, Comisky and McCauley (hereinafter "Blank, Rome"). He withdrew from the active practice of the law in about 1970 or 1971, and severed all connections with the firm at that time. However, his son is now associated with that firm, and Mr. Schwartz himself continues to be personally friendly with various members of that firm. In the course of his meeting with the undercover agents, Schwartz was asked to recommend a law firm which, in his judgment, would do a good job in handling the legal affairs of the proposed hotel project. He mentioned three firms, one of which was Blank, Rome. Shortly thereafter, while having lunch with a partner in the Blank, Rome firm, Schwartz alerted him to the possibility that the Arabs might be interested in retaining Blank, Rome, and also explained that Criden apparently expected his own firm to share in the work, and in any fees which might be generated. It was agreed that Criden's law firm would not be able to participate, because Johanson, a member of City Council, was a member of that firm. There was no further discussion of the project with the Blank, Rome firm, but it appears that shortly thereafter, Criden and Cook discussed the possibility of severing their connection with the existing law firm, and joining Blank, Rome in some fashion, if the hotel project materialized, and if the Arabs should select Blank, Rome as their counsel.

I believe the evidence permitted the jury to conclude that the defendant participated in the bribe transaction with knowledge that Criden was also a participant, that Criden was engaged in a series of similar transactions, and that Criden's activities occurred in the course of his conduct of the affairs of Criden's law firm. In my view, it was not necessary for the Government to prove that Schwartz fully supported all of Criden's long-range goals. Moreover, there is authority for the proposition that proof of *scienter* and *mens rea* which suffices for conviction of the predicate offenses also suffices for conviction of RICO conspiracy based upon those predicate offenses. *U.S. v. Boylan*, 620 F.2d 359 (2d Cir. 1980).

The defendant, relying on *U.S. v. Elliott,* 571 F.2d 880 (5th Cir. 1978), argues that the Government was required to prove that he specifically intended to participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity, that is, it must be shown that the defendant himself participated in at least two acts of racketeering. Upon close reading of the opinion in that case, it is not altogether clear that the court goes that far; there is room for an interpretation to the effect that participation in a single act of racketeering, with knowledge that it was part of a pattern of similar acts, would suffice. Be that as it may, there was evidence in the present case from which the jury could reasonably have concluded that Schwartz had some involvement in the Jannotti bribe transaction as well as his own.

Taken as a whole, and viewed in the light most favorable to the Government, the evidence in this case sufficed to enable a reasonable jury to conclude, with the requisite assurance, that the essential elements of the crime charged in Count II of the Indictment were made out, as to the defendant Schwartz. It therefore becomes necessary to address the entrapment and due process defenses asserted.

III. ENTRAPMENT

A. *In General*

Discussion of the law of entrapment properly begins with a brief recapitulation of the decisions of the Supreme Court on this subject. In *Sorrells v. U.S.,* 287 U.S. 435 (1932), a prohibition agent, masquerading as a businessman-tourist, persuaded the defendant to obtain for him a half-gallon of whiskey. The defendant yielded to repeated requests, made in the course of a social gathering in which the prohibition agent emphasized his World War I military service in the same unit as the defendant. The Court unanimously held that these circumstances, if established, amounted to impermissible entrapment. The majority, in an opinion by Chief Justice Hughes, took the position that Congress could not have intended the National Prohibition Act to apply to sales induced by govenment agents from otherwise innocent defendants, and held that the entrapment defense should have been submitted to the jury. The Chief Justice referred to

> ". . . the duty of the Court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers, and to preserve the purity of its courts." (287 U.S. at p. 446.)

The concurring opinion by Mr. Justice Roberts, in which Justices Brandeis and Stone joined, rejected the majority's statutory-intent analysis, but agreed that, if the facts were as asserted by the defendant, no conviction would be permissible. They felt that the issue was properly one for the Court, rather than the jury; the language of the concurring opinion suggests an admixture of due process and supervisory power concepts.

In *Sherman v. U.S.*, 456 U.S. 369 (1958), a government informant first met the defendant, a former drug addict, at the office of a physician who was treating both men for addiction-related problems. Thereafter, there were several accidental meetings *(e.g.*, at a drug store where both had their prescriptions filled) in the course of which the two became friendly, compared notes, etc. The informant pretended to be desperately in need of drugs, and repeatedly urged the defendant to obtain some for him. The defendant eventually yielded to these importunings, helped the informant obtain drugs, and became readdicted himself. It was at that point that the informant first contacted law enforcement agents about the defendant, although he had previously acted as informant in other cases. The defendant had twice been convicted of drug-related offenses, several years earlier.

The entrapment issues were presented to a jury, which nevertheless convicted the defendant. The Supreme Court unanimously held that the conviction must be reversed, and that the Government's own evidence established entrapment as a matter of law.

The majority opinion, by Chief Justice Warren, cited *Sorrells,* and seems to have adopted its legislative intent rationale. The net effect of the majority opinion, at any rate, is that the line is to be drawn between trapping the unwary innocent, and trapping the unwary guilty, into the commission of a crime. Mr. Justice Frankfurter's concurring opinion, in which he was joined by Justices Douglas, Harlan and Brennan, rejected the legislative intent analysis of *Sorrells,* and the predisposition analysis of the majority, and urged adoption of an objective test, focusing upon the conduct of the government agents: if the conduct of the government agents was such as to be likely to cause a person of reasonably firm moral convictions to stray from the path of righteousness, the case should be dismissed. The standards of permissible governmental inducement should be the same for all defendants, whether predisposed or not.

In *U.S. v. Russell,* 411 U.S. 423 (1973), government agents furnished a chemical substance, P2P, not in itself contraband, to the defendant in order to enable him successfully to complete the unlawful manufacture of methamphetamine. In a 5-to-4 decision, the Court upheld the conviction. The majority opinion reaffirmed and clarified the *Sherman* and *Sorrells* holdings adopting the subjective approach, and ruled that creative involvement by government agents is not a defense which may be asserted by a predisposed defendant. The dissenters, in opinions by Justices Douglas and Stewart, argued for the objective approach adopted by Mr. Justice Frankfurter in *Sherman.*

In *Hampton v. U.S.*, 425 U.S. 484 (1976), the defendant claimed that it was the Government which, through an informant, actually supplied the drugs which the defendant was prosecuted for distributing. It was conceded that the defendant was predisposed, and he therefore did not request a jury instruction on entrapment as defined by the majority in *Russell.* He did, however, specifically request a charge to the effect that, if the jury believed that the drugs had been supplied by the Government, there could be no conviction.

By a 5-to-3 vote, the Supreme Court upheld the conviction. The plurality opinion by Mr. Justice Rehnquist, in which Chief Justice Burger and Mr. Justice White joined, expressed the view that there can never be a successful entrapment defense if the defendant is predisposed, and that a defendant may be heard to complain that the conduct of government agents was so egregious as to amount to a violation of due process only if his own due process rights were violated.

Concurring in the judgment, Mr. Justice Powell, joined by Mr. Justice Blackmun, took the view that there may be situations in which the conduct of the Government is so outrageous as to preclude conviction of even a predisposed defendant; but that the case under consideration did not reach that level of outrageousness. The three dissenting Justices adhered to the objective analysis of entrapment, and viewed the defendant's conviction as a clear violation of his constitutional rights, and as calling for the exercise of the court's inherent supervisory power over the administration of justice.

Finally, although not directly pertinent, the recent decision in *U.S. v. Payner*, — U.S. —, 100 S. Ct. 2439, 65 L.Ed.2d 468 (1980) should be mentioned. In that case, agents of the Internal Revenue Service hired a firm of private detectives to steal a briefcase from a third party, and helped them photograph numerous documents found therein. These documents led to the discovery of other evidence which formed an important part of the Government's case against the defendant. Conceding that the defendant lacked standing to assert Fourth Amendment issues, the trial court nevertheless, in the exercise of its supervisory powers, suppressed the evidence and set aside the conviction. The Supreme Court, in a 6-to-3 decision, reversed, and reinstated the conviction. The majority opinion, by Mr. Justice Powell, held that it was improper to invoke the court's supervisory power in these circumstances. Only persons whose own Fourth Amendment rights are violated have standing to invoke the exclusionary rule.

The guiding principles which emerge with clarity from these pronouncements of the Supreme Court include the following:

1. It is perfectly proper for law enforcement officials to engage in undercover activities, including deception and trickery, where both the purpose and effect of their activities is to enforce the law by ferreting out and exposing criminal activities. Entrapment issues arise only where the Government induces or persuades a person to commit a crime, or actually participates in the commission of the crime.

2. Under no circumstances is it permissible to convict of crime a non-predisposed defendant who was induced by government agents to commit the crime charged. No member of the Supreme Court has ever expressed any doubt as to the correctness of this principle, although varying reasons have been put forth from time to time for its justification.

3. A predisposed defendant may properly be convicted notwithstanding he was induced by government agents to commit the particular crime charged, so long as the inducement is not such as would be likely to cause a person of reasonably firm moral convictions to stray into criminality. For some members of the Court, this is true because, in their view, a predisposed defendant cannot successfully assert an entrapment defense under any circumstances. For other members of the Court, this is true because entrapment should be viewed as a matter of the objective reasonableness of the conduct of the government agents. Neither of these approaches is fully accepted by a majority of the Court. There is, however, majority acceptance of a middle ground, set forth in the following paragraph.

4. A predisposed defendant may properly be convicted notwithstanding governmental inducement or creative involvement, unless the conduct of the government agents was so outrageous as to violate fundamental concepts of fairness; that is, unless the conduct of the government agents was so outrageous as to be deemed a violation of due process. The converse of this statement, namely, that even a predisposed defendant cannot be convicted if the Government's conduct amounted to a violation of due process, probably also represents the view of a majority of the members of the Court, although some may regard it as still an open question, and it is probable that opinions concerning what is, and what is not, sufficiently outrageous conduct can be expected to vary.

There are several pertinent decisions of the courts of appeals which shed light upon the proper application of the principles established by the foregoing Supreme Court decisions to particular fact situations. Before proceeding to a discussion of these intermediate appellate decisions, certain general observations are in order.

The first is that decisions rendered before *Russell* and *Hampton* have continuing validity only insofar as they are consistent with those decisions.

The second, and perhaps less obvious, point is that the term "inducement" in the entrapment context is often used in a broad sense, to include very different forms of governmental activity; and that the Supreme Court's resolution of the objective-subjective controversy does not mean that the precise nature of the governmental activity alleged to constitute inducement in a particular case is no longer significant.

Most of the cases dealing with entrapment have been narcotic cases. Indeed, virtually all of the Supreme Court decisions on this subject have involved some form of contraband. Because of the special problems of detection and proof involved in narcotics cases, and because of the extreme danger to the public inherent in narcotics trafficking, it is plainly necessary to avoid placing undue restrictions upon the scope of permissible police activities in that area. Moreover, the likelihood that a truly non-predisposed person will be lured into crime of that type is relatively slight.

Entrapment involves both the activities of the government agents and the defendant's response to those activities. Under the general label "inducement" the reported decisions have included such diverse elements as suggesting that the crime be committed, providing some or all of the instrumentalities or facilities needed to complete the crime, actively participating in the commission of the crime, providing varying degrees of incentives, providing varying degrees of persuasion or even coercion, or a combination of these ingredients. The term "predisposition" has sometimes been interpreted to mean that the defendant was ready and willing to commit crimes of that type, and sometimes to mean that the defendant was ready, willing and able to commit crimes of that type.

In the wake of the *Russell* and *Hampton* decisions of the Supreme Court, it is probable, although arguably not altogether clear, that a defendant can no longer successfully assert that, although he was ready and willing to commit crimes of that type, he lacked the ability to carry out the crime until the government agents provided essential assistance. In *Russell,* for example, the chemical ingredient supplied by the Government was not readily obtainable from other sources. On the other hand, the rationale of the majority opinion in that case appears to have been based, at least in part, upon the proposition that the defendants might have been able to obtain the P2P from some other source. And in *Hampton,* the Court was plainly of the view that the defendants undoubtedly had other sources of supply.

Under both the subjective and the objective approaches to entrapment, the relationship between the conduct of the government agents and the response of the defendant continues to be important. The question still is, did the Government induce the defendant to commit a crime he would not otherwise have been likely to commit? As a practical matter, however, the fact that the actions of the government agents were themselves illegal will often have very little bearing upon their power to persuade. A non-predisposed defendant would ordinarily not be likely to be lured into crime merely by being made aware that others were willing to commit unlawful acts. Moreover, with respect to the kinds of crimes in which governmental participation in illegal conduct is most likely to be a necessary adjunct of law enforcement—narcotics, prostitution, and other "victimless" crimes—a rule precluding successful prosecution whenever the conduct of the government agents is shown to have been illegal would provide the sophisticated criminal with a ready means of determining whether a person he is about to deal with is or is not an undercover agent.

While the focus of the entrapment defense, in view of the Supreme Court's adherence to the subjective analysis of entrapment, is upon whether the defendant was or was not predisposed, it continues to be necessary to evaluate the conduct of the Government to determine whether it amounted to inducement in the first place. Once inducement is shown, the emphasis is upon predisposition, *i.e.*, the character of the accused. But it is not always possible to achieve complete compartmentalization in this context. That is, it is sometimes impossible to achieve a correct resolution of the predisposition question in total disregard of the nature of the governmental inducement.

A further point, implicit in the preceding discussion, must also be addressed, namely, the need to focus upon just what it is that constitutes the state of mind which can properly be characterized as predisposition, and what evidence suffices to establish it. The Supreme Court has thus far not had occasion to explore this subject in depth, and it has received very little attention in the courts of appeals' decisions. In *Russell* and *Hampton*, predisposition was conceded. In *Sherman*, without extended discussion, the Supreme Court unanimously held that the existence of two previous narcotics convictions, several years earlier, did not prove predisposition. In *Sorrells*, the Court held that evidence that the defendant had a reputation in the community as being a rum-runner did not rule out the possibility that he was not predisposed; the question was for the jury.

It is clear that we are concerned with the defendant's state of mind and inclinations before his initial exposure to the government agents. But the distinction between a predisposed and a non-predisposed state of mind is not necessarily clearcut. At one extreme is the defendant who customarily engages in this type of criminal activity as a way of life, and who enthusiastically embraces any additional opportunities for such activities. At the other extreme is the resolute individual who would not commit a crime of this type under any circumstances. In between are many gradations: the person who occasionally commits crimes of this type, and would be willing to do so again only if a particularly favorable opportunity should present itself; the person who has previously succumbed to temptation, but is making a sincere and concerted effort to resist such temptations; the previously innocent person who is weak and easily influenced. In his influential and relatively early article on entrapment issues, Professor Donnelly suggests distinguishing between situational offenders and chronic offenders, Donnelly: *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs,* 60 Yale L.J. 1091, 1113 (1951), but that distinction does not appear to have been adopted, in terms, by the courts.

Moreover, the defendant's state of mind before the initial exposure to the government agents must be determined after the fact. Sometimes this poses no great difficulty, as where there is evidence of pre-exposure activities or declarations tending to establish the defendant's preexisting criminal bent. But often, as in the present case, the sole proof of predisposition consists of evidence as to what the defendant did on the occasion in question, in response to the overtures of the government agents. In such cases, I believe it is particularly important to recognize that the defendant's response to governmental inducement must be viewed in light of the precise nature and extent of the inducement.

The foregoing analysis is entirely consistent with the pertinent Third Circuit decisions which survive *Russell* and *Hampton*. In the leading entrapment case in this Circuit, *U.S. v. Watson,* 489 F.2d 504 (3d Cir. 1973), the court held that "once there is sufficient evidence of Government inducement to commit the crime to entitle the defendant to go to the jury with an entrapment defense," the burden of proof is upon the Government to negate entrapment. There is no separate allocation of the burden of proof as between inducement and predisposition; the defense should be treated as a unit, with the Government having the burden of overcoming it. The court stated:

> "This conclusion is consistent with the Supreme Court's reaffirmation that the focus of the entrapment defense is on the predisposition of the defendant rather than on the nature of the police behavior. *U.S. v. Russell,* 411 U.S. 423, 429, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973). Inducement does not become irrelevant to either party, to be sure, since the stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the inducement rather than to the defendant's own predisposition. Under the unitary approach we require, inducement therefore enters as an element of predisposition which the Government must disprove, rather than as an independent element which the defendant must prove." (489 F.2d, at p. 511.)

See, also *Government of the Virgin Islands v. Cruz,* 478 F.2d 712 (3d Cir. 1973); *See also, U.S. v. Hill* (3d Cir., Nov. 25, 1980).

In *U.S. v. Armocida,* 515 F.2d 49 (3d Cir. 1975), the court held that there can be no entrapment defense unless there is both (1) evidence that government agents initiated the crime and (2) evidence suggesting that the defendant may not have been predisposed. In that case, a fairly routine purchase of drugs by undercover agents, the defendant did not testify, and neither the direct nor cross-examination testimony of the Government's witnesses revealed any reluctance on the part of the defendant-seller.

The court held that, while the record might support a finding that the Government initiated the crime, a charge on entrapment was unnecessary because of the absence of any colorable basis for questioning the defendant's predisposition.

The Third Circuit's formulation of the test for determining the presence of legitimate entrapment issues is generally consistent with the conclusions reached in other circuits. *See, e.g., Kadis v. U.S.*, 373 F.2d 370 (1st Cir. 1967); *U.S. v. Riley*, 363 F.2d 955 (2nd Cir. 1966).

While cases involving dealing in contraband provide the primary source of the developing law of entrapment, the general principles thus far discussed are not limited to contraband cases. Thus, in *Lopez v. U.S.*, 373 U.S. 427 (1962), where the defendant was charged with bribing an Internal Revenue Service agent, the fact that the initial offer came from the defendant led the Court to hold that entrapment issues need not have been submitted to the jury. *See,* also *Osborne v. U.S.*, 385 U.S. 323 (1966) (jury-tampering).

It seems clear that it is not automatically entrapment for a government agent to offer a bribe to a public official, *Scriber v. U.S.*, 4 F.2d 97 (6th Cir. 1925). In *Scriber,* an undercover agent offered, and paid, $20 to a customs official to facilitate illegal importation of whiskey. The court stated:

> "Nor can we see that the defense of entrapment, more accurately defined, can be applicable to a situation, where the offense charged is the accepting of a bribe by a public officer, and where the supposed instigators do nothing except to give the officer opportunity to accept a bribe, and to expose him to what might be called the ordinary degree of temptation to which such officers are likely to be subjected at any time in the

> daily discharge of their duties . . . The prohibition agents did nothing to overcome Scriber's shrinking or reluctance. So far as they observed, he did not shrink. In such a case as that, we think it clear that a crime, otherwise rightly to be inferred, cannot be escaped by the aid of this defense" (at p. 98).

In a footnote, the court observed that the amount of the bribe was "not a substantial temptation to a first offense." The court thus appears to have left open the possibility that an unusually generous bribe offer might justify the conclusion that the defendant was impermissibly lured into crime.

Finally, it should be noted that, contrary to some of the assertions of the defendants in this case, the Government is not required to prove that its undercover investigation of the defendant was based upon probable cause to believe he was engaged in illegal activity, *U.S. v. Catanzaro,* 407 F.2d 998 (3d Cir. 1969); and that hearsay evidence is not admissible to prove predisposition. *Id.*, at pp. 1000-1001.[2]

B. *The Entrapment Defense in This Case.*

The undercover operation which has come to be known as Abscam was established initially by F.B.I. agents working out of the Hauphaug, Long Island, office of that agency, in conjunction with a career swindler named Melvin Weinberg, whom they had recruited for the task. While the details of the ruse varied from time to time, as the result of improvisation by various undercover agents, the broad outlines of the scheme remained fairly constant: The undercover agents represented one or more extremely wealthy Arab sheiks desirous of investing huge cash resources in this country. Arrangements were made with the Chase Manhattan Bank, so that anyone who inquired would receive vertification that the Arabs did indeed have more than $400 million on deposit with that institution. Mr. Weinberg would "spread the word" through his underworld contacts and other shady connections. It was contemplated that persons expressing interest in providing investment opportunities would be carefully screened; if the proposed deal appeared legitimate, no further action would be taken, but if there was reason to suppose it might provide an opportunity for discovering criminality, the matter would be pursued, and the participants videotaped or otherwise electronically recorded. In actual practice, however, as discussed below, the distinction was not always carefully observed.

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[2] For a comprehensive review and analysis of entrapment doctrine, see Parks: "The Entrapment Controversy," 60 Minn.L.Rev. 163 (1976).

Angelo Errichetti, the Mayor of Camden, New Jersey, was an early target of the investigation, and brought most of the other targets to the attention of the investigators. Long active in political affairs in New Jersey, as a State Senator, as a party leader, and as Mayor, Mr. Errichetti represented himself as having extensive underworld contacts, and as possessing a great deal of information concerning the corruptibility of public officials. For present purposes, it is unnecessary to attempt to distinguish between solid fact and hyperbole. It suffices to state that the F.B.I. agents had reasonable grounds for believing that Mr. Errichetti was predisposed, had underworld contacts, and was thoroughly corrupt. Mr. Errichetti's unabashed pursuit of opportunities for financial reward apparently led the undercover agents to the easy, but unjustified, assumption that anyone introduced to them by Mayor Errichetti could automatically be regarded as equally corrupt.

Mr. Weinberg was strongly motivated to produce results for his F.B.I. employers. At the time he was recruited, he faced a substantial prison sentence on charges of mail fraud, covering transactions which had netted him in excess of $100,000. The F.B.I. interceded with the sentencing judge, and arranged to have Mr. Weinberg placed on probation. It was also agreed that Weinberg would receive substantial compensation, plus reimbursement of expenses and other fringe benefits, during his Abscam employment. He thus had a direct financial stake in the continuation and expansion of the Abscam investigation. Moreover, the aura of wealth, expensive living, and free spending, and the probable limited duration of his employment, were not without their own temptations for one who, at other stages of his career, probably represented the archetypical amoral fast-buck artist.

Mr. Weinberg and the undercover agents were unstinting in their efforts to present a realistic image of great wealth: they entertained on a yacht in Florida, they rented a townhouse in Georgetown, they occupied a $365-per-day hotel suite in Philadelphia and equally lavish accommodations in New York, they traveled by private jet and in chauffeur-driven limousines.

At this point, it is appropriate to observe that, while the circumstances thus far discussed could be regarded as providing a singularly attractive opportunity for soliciting improper payments—the agents were free-spenders, their resources appeared virtually limitless, and Americans generally viewed oil-derived Arab wealth with resentment—if the agents had merely awaited such solicitation, it is doubtful that entrapment issues would have arisen. But the investigation had two additional characteristics which cast a quite different light upon ensuing developments.

Perhaps the crucial aspect of the undercover operation was its emphasis upon "the Arab mind," "the Arab way of doing business." A constant theme of the agents' representations was that their principals would not undertake any project unless first assured of the "friendship" of the persons with whom they were dealing. They were impressed with titles, with persons in official positions of power and influence. Their concept of "making friends" was that money had to be paid. At least insofar as the Philadelphia aspects of the investigation were concerned, there was no suggestion that the putative sheik required or expected any violation of the law in exchange for the payment; he merely wished to be assured that he had "friends" in high places.

A concomitant feature of the investigation was the question of precisely where the loyalties of the sheik's representatives lay. Mr. Weinberg and the undercover F.B.I. agents made it clear that their sole aim was to please their Arab employer by being able to tell him truthfully that which he was interested in hearing, namely, that money had been paid to high officials. The agents did not require any commitment that the public official would actually be influenced by the payment; they were interested only in appearances.

Two examples illustrate the extent to which the agents were prepared to go. United States Senator Harrison Williams, a 30-year veteran of the Senate, was interested in obtaining financing for a titanium venture in which he or members of his family had an interest. His concept was that, by installing improved equipment, an American titanium mine could produce titanium needed by a nearby paint manufacturer at a lower price than the paint company's overseas suppliers. In short, he was seeking financing for an entirely legitimate business proposition. Throughout the preliminary discussions, Senator Williams made it very clear that the venture would not be dealing with the United States Government, and that he neither could nor would be in any way involved with government contracts. Ostensibly, the financing arrangement was eventually structured in such a way as to produce a substantial profit to the Senator from the equivalent of a sale of his original interest to a new venture which included the Arab investors. Throughout these negotiations, Senator Williams repeatedly rebuffed suggestions from the undercover F.B.I. agents about various ways in which these profits might be concealed from the Internal Revenue Service. Eventually, the senator was told that, before finally approving the transaction, the sheik wished to meet with him. Immediately before meeting the sheik, Mr. Weinberg engaged in an extensive coaching session. In effect, the Senator was told that, whereas both he and the representatives knew that the proposed venture was entirely legitimate, that it would not involve government contracts, and that the Senator had not agreed to and would not be expected to use his official position to advance the interests of the enterprise, it would be helpful if the Senator were to impress the sheik with the importance of his position in the Senate, and his knowledge of other important persons in the Government.[3] Senator Williams was then ushered into another room to meet the sheik, before the hidden TV cameras. After pointing out the merits of the proposed business deal, Senator Williams did brag about his long tenure in the Senate and his many contacts in Washington.

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[3] It is undisputed that the tape recording of this conversation was delivered to the F.B.I. agents within an hour or so after the conversation took place. It is also undisputed that Mr. Weinberg was never cautioned against employing the same technique with other potential targets. Even more disturbing is the fact that, in a pre-prosecution memorandum dated December 12, 1979, and submitted to his superiors in the Department of Justice by Thomas Puccio, Esq., the attorney from the Brooklyn Strike Force who was in charge of the Abscam investigation, no mention is made of Weinberg's coaching of Senator Williams; only the tape of the actual meeting with the sheik is referred to. On the basis of an in camera inspection of documents shielded by executive privilege, however, it is clear that Mr. Puccio was aware of the coaching incident.

The second example arose after it had been made clear to Errichetti and to Howard Criden that there was money to be made by merely arranging introductions of officials who would present themselves as corruptible, irrespective of their genuine inclinations. Criden and Errichetti arranged to have Ellis Cook, Esq., a young lawyer associated with Criden, introduced to the undercover agents as a (named) official in the New Jersey office of the Immigration and Naturalization Service. The plan was that Mr. Cook would accept the agents' largesse and later share it with Criden and Errichetti. The attempted impersonation was exposed, however, when the agents noted that Mr. Cook was too young for the part he was playing. Notwithstanding the attempted deception, the agents continued to avail themselves of the services of both Criden and Errichetti in arranging further introductions; they merely exercised greater care in obtaining independent verification of the identity of the persons brought in for interviews.

The two examples just discussed did not, of course, directly involve the defendants Schwartz and Jannotti, but they are noteworthy parts of the background against which are to be evaluated the Government's assertions—in public statements by officials of the Justice Department, and in arguments made in the course of the trial of this case—that the undercover agents reasonably and in good faith relied upon the "middlemen," Criden and Errichetti, to bring in only persons already corruptible, and that the undercover agents neither intended to, nor did, bring in for surreptitious filming persons presenting legitimate business proposals.

The actual Philadelphia aspects of the Abscam investigation developed as follows: Howard Criden and Louis Johanson were partners in a small Philadelphia law firm. Johanson was also a member of the Philadelphia City Council. The two attorneys represented a client who held an option to purchase certain land in Atlantic City, New Jersey, believed to be a suitable site for a casino. The attorneys were employed, on a generous contingent-fee basis, to obtain financing for the development of the site. Johanson played golf at a New Jersey country club. He mentioned the casino proposal to another member of the club, a casual acquaintance named Meiler, a successful Philadelphia businessman. It happened that Mr. Meiler had a summer home at the seashore near the summer home of Mayor Errichetti. In the course of earlier discussions between Meiler and Errichetti stemming from Meiler's interest in obtaining dockside storage facilities in Camden, Meiler had been made aware of Errichetti's supposed access to wealthy overseas investors. Meiler arranged a meeting between Johanson and Criden and the Mayor. Criden and Johanson were later advised that the sheik's representatives were interested in the proposed project, and Criden and Johanson were invited to the yacht in Florida to present the proposal to the sheik's representatives.

It is undisputed that the casino proposal of Criden and Johanson was a perfectly legitimate business proposition. At the meeting on the yacht, Criden presented preliminary plans for the project, and was led to believe that the sheik would be very much interested in providing the necessary financing. The discussion of the casino project on that occasion was electronically recorded, and the transcript reveals no suggestion of illegality or impropriety. Thereafter, however, there was a further discussion, not electronically recorded, in which the undercover agents for the first time broached the subject of the sheik's interest in the possibility of becoming a permanent resident of this country, in the event of adverse political developments in his home country. It is agreed that Johanson was not present during this latter conversation. There is considerable uncertainty as to whether Criden was present; if so, he did not participate. On the return trip to Philadelphia, Mayor Errichetti told Criden of the agents' interest in meeting members of Congress or other officials who might provide assistance with immigration problems. Errichetti informed Criden that, on the basis of his previous experience with the sheik's representatives, and incredible as it might seem, the representatives would pay substantial sums of money for merely being introduced to important people to whom the representatives could pay money without asking or receiving any "*quid pro quo.*"

For the next several months, Criden, Johanson and Errichetti were instrumental in arranging meetings between various congressmen and the sheik's representatives. A substantial factor in the motivations of Criden and Johanson was their desire to remain in the good graces of the persons who, they believed, were going to finance their casino project, from which the two lawyers hoped to earn a contingent fee in excess of $1 million. In part, also, they were motivated by the generous financial rewards they derived from sharing in the sums paid the public officials, and, later, by receipt of direct payments from the representatives for their services in arranging introductions.

Because Criden and Johanson, and two of the congressmen, were from Philadelphia, the United States Attorney in this District was made privy to the progress of the Abscam investigation. By this time, Mr. Criden was emulating Mayor Errichetti in his professions of extensive knowledge of political corruption and underworld activities in the Philadelphia area, and Mr. Vaira (the U. S. Attorney in this District) was anxious to avail himself of the Abscam device here in Philadelphia. For various reasons, the entire investigation was about to be terminated; Mr. Vaira and the Philadelphia F.B.I. office were authorized to pursue the Abscam investigation in this area, but only for a period of 10 days.

The technique by which the investigation was shifted to the Philadelphia area was relatively simple: Mr. Weinberg informed Criden that the sheik had expressed interest in establishing a base of operations in Philadelphia, and that Criden would be receiving a call from a new representative of the sheik (actually, F.B.I. Agent Wald) who would be handling matters for the sheik in this respect.

In their initial, videotaped, meeting, undercover Agent Wald explained to Criden that the sheik was interested in building a hotel complex in Philadelphia, and might also be interested in major long-range projects having to do with the revitalization of Pennsylvania's coal industry and related major improvements along the Philadelphia waterfront, but only if, in accordance with the normal workings of "the Arab mind" he could be assured of the friendship of important governmental officials. Criden suggested the agent might wish to discuss these matters with the two Philadelphia congressmen previously involved in their immigration discussions, Congressmen Myers and Lederer. The agent pointed out that his principal was sufficiently sophisticated to know the distinction between federal matters and local matters, and that the kind of zoning and similar problems which might be encountered in building a hotel would be within the province of city officials. The agent inquired as to the extent of Criden's familiarity with officials of the City of Philadelphia. Criden reminded the agent that his partner, Johanson, was a member of City Council, and it was agreed that Mr. Johanson would be brought in for a meeting with the undercover agent to discuss the hotel project. Criden also reviewed with the agent the identities of various important persons in the city government, including the Mayor and the President of City Council, the defendant Schwartz, and the Majority Leader, the defendant Jannotti. Asked if it would be possible for the agent to meet and "deal" with these individuals, Criden advised against meeting with the Mayor (because he had just assumed office, and was an "all-American boy" type), but stated he would find out whether Schwartz and Jannotti would be willing to meet with the representative.

Asked what the amount of any payment to the City councilmen should be, Criden responded, "You tell me." After some further discussion, it was agreed that, since payments to the congressmen had been on the order of $50,000 each, a figure of $30,000 would be appropriate for the President of City Council, and lesser sums for the other two councilmen. Criden assured the agent that, unless each individual agreed in advance to accept the money, no meeting between the representative and that individual would be arranged. It is also a permissible inference that, as between Wald and Criden it was understood that it would be improper for a councilman to accept such payments.

Criden promptly arranged a meeting between Johanson and the agent, at which Criden was also present. Following a lengthy dissertation by Johanson concerning the desirability of the proposed hotel project, the undoubted willingness on the part of all city officials to cooperate in seeing it become a reality, and his own willingness to support the project without receiving money, and further discussion by the agent of the Arab mentality and his principal's attitude toward business of this kind, it was agreed that the financial arrangements had already been discussed between Criden and Johanson to Johanson's complete satisfaction. Johanson thereupon was paid $25,000 in cash, and left the meeting. Criden was thereupon paid $5,000 in cash for his services in arranging the meeting.

Criden was presented with a problem insofar as the defendant Schwartz was concerned. In the course of his discussions with the undercover agent, Criden had professed to be a long-time friend and colleague of Schwartz, although he stated he did not know whether Schwartz would be interested in accepting money. Actually, however, Criden had never met Schwartz, and Schwartz had barely heard of Criden. Criden thereupon enlisted the aid of Common Pleas Court Judge Shiomos, a friend of Criden's who lived in the same apartment house as Schwartz, to arrange a meeting.

According to the Government's evidence, Schwartz was told that the sheik's representatives wished to obtain Schwartz's expert advice concerning the workings of city government, the procedures for obtaining the necessary governmental approvals, etc., and would be willing to pay him a $30,000 consulting fee.

As between Criden and Schwartz, it was apparently understood that Schwartz would be expected to remit a portion of the $30,000 fee to Criden, as a forwarding fee. As between Criden and Judge Shiomos, it was agreed that Judge Shiomos and an insurance broker named Kattleman, a friend of Shiomos who played a role in arranging the meeting with Schwartz, would each receive $3,000 for their services. According to Judge Shiomos, however, the entire $6,000 was for Mr. Kattleman since Judge Shiomos, in view of his position, was not permitted to accept fees for legal services; Judge Shiomos permitted Criden to believe that he was accepting the $3,000 for himself, so as to increase the share of his friend Kattleman who was in poor health and needed money.[4]

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[4] Kattleman did not testify at the trial.

By way of further background, it should be explained that Criden and Judge Shiomos had previously discussed the possibility of Shiomos' association with Criden's law firm at the expiration of the judge's current term of office. Shiomos' interest in such an arrangement was greatly enhanced when Criden told him about the proposed casino project and the proposed hotel and other Philadelphia projects.

Judge Shiomos arranged to meet with Mr. Schwartz. His version of that meeting was as follows:

> "I said [Criden] had some clients that were very wealthy. They were Arab clients, that they had about $400 or $500 million in New York and they wanted to invest $150 million to build a hotel here . . . I mentioned to him that if he is willing to discuss it any further that I would call Mr. Criden and have him call him.
>
> "I indicated to Mr. Schwartz that Mr. Criden said there would be a fee and that Mr. Criden expected part of that fee . . . There would be a fee for Mr. Schwartz for his advice.
>
> "Q. And what did Mr. Schwartz say in response to that?
>
> "A. Mr. Schwartz indicated at that point—all he said, 'I would be interested in anyone who is willing to invest $150 million.'" (Trial tr. 3.137-38.)

It was agreed that Shiomos would have Criden telephone Schwartz to arrange a meeting. As he was leaving, Judge Shiomos commented to Mr. Schwartz that he did not believe there was anything improper in the proposed transaction, and that if Mr. Schwartz thought there was "anything improper or fishy," he would be in a position to judge for himself after meeting with Mr. Criden.

Since neither Criden nor Schwartz testified at trial, there is no direct evidence about the contents of their discussion. However, Schwartz accompanied Criden to a meeting with the undercover agents on January 23, 1980, and the videotape of that meeting, together with other evidence, demonstrates that Schwartz knew he would be paid $30,000, and that the payment would be shared in some way with Criden.

The transcript of the meeting between Schwartz and the undercover agents is entirely consistent with the "consulting fee" theory: Schwartz explained at some length the political make-up of the city government, the various agencies that would deal with various aspects of such a project, the lines of authority within the city government, and the political power structure in Philadelphia. He made it very clear that the proposed project would be warmly received, that he could foresee no obstacles, and that any minor problems which might arise could easily be solved. Much of the discussion concerned which law firms in the city were experienced in handling major real estate developments, and Criden's anticipated role in working with the law firm designated.

Agent Wald repeatedly asked for assurances that the project would encounter no "problems," and Schwartz repeatedly assured him that the project appeared to be entirely legitimate and beneficial for the City, and that it would have his support. Schwartz made it clear that he controlled the City Council, and that his predictions concerning the absence of difficulties could be relied upon. When the agent expressed his satisfaction with the results of the meeting and produced the envelope containing the money, Criden assured him that the amount had been discussed with Schwartz and was satisfactory to him, and Schwartz stated that he was not primarily interested in the money, but in the benefits the project would have for the people of Philadelphia.

Schwartz's words and actions during the meeting, as disclosed on the videotape, can be interpreted in either of two ways: (1) that he was rendering legal advice and advice as an expert on city government and real estate development, in exchange for a consulting fee. Under that interpretation, his bragging about his control over City Council and entree to all other departments of city government was intended to assure the "client" that he knew what he was talking about, and that his advice was sound. Under that interpretation, Schwartz was merely violating the City Charter's prohibition against conflicts of interest, or attempting to circumvent these requirements on the theory that general advice about city governmental matters is distinguishable from actual representation of clients before city agencies. Or (2) that he was accepting a bribe for assuring his official support of a project he would have been willing to support in any event. Under that interpretation, his bragging about his control of city government was designed to assure the bribe payers that their money was well spent. It is apparent from the verdict that the jury chose the latter interpretation.

In part I of this Opinion, it has been determined that the sole count of the Indictment on which the defendant Jannotti was convicted should be dismissed for lack of jurisdiction. Since the Government may wish to appeal that ruling, however, it is appropriate to address the entrapment issues as they relate to Jannotti, as well as Schwartz.

Mr. Jannotti met with the undercover agents, together with Criden, on January 24, 1980. Before arriving at the meeting, he had been briefed by Criden and Schwartz. Agent Wald repeated, several times, his explanation of the peculiar psychology of his Arab employers, and their "way of doing business." Jannotti sought and received assurances about the nature of the project, and its legitimacy. Jannotti's reaction is typified by his comment, early in the conversation, "Who could refuse a project like that?" (Trial Tr. p. 4.56.)

The agents kept pressing for responses which would demonstrate Jannotti's willingness to sell his vote, but these efforts met with little success. At one point, it appeared that the agents had succeeded. The following exchanged occurred:

> "WALD: Alright, when we're paying good money . . . substantial amounts here at this point to ah, ah. insured we'd got some friends in City Council, if we have a close vote on a situation we can, we can ensure—
>
> "JANNOTTI: My vote, my vote will be there."

But this was immediately followed by the following exchange:

> "WALD: That after conducting business this evening that . . .
>
> "JANNOTTI: My vote will be there because as I said the project is legitimate.
>
> "POULIS [F.B.I. agent]: Yeah, well, we know that we are going to be legitimate.
>
> "JANNOTTI: That's right.
>
> "POULIS: But like, like I was saying before you know—
>
> "JANNOTTI: I would vote for a legitimate project regardless." (Trial Tr. p. 4.78-4.79)

Other statements by Jannotti are to the same effect:

> "JANNOTTI: . . . We'll be there, we'll be there trying to do everything we can for you . . . No problem with that because it's as I say before a legitimate project, when you are coming in, I would go to bat with, without (p. 4.85)

* * *

> "Jannotti: Whatever George [Schwartz], whatever George had told you yesterday, I mean I am his righthand man and I . . . Whatever George had said to you I'll go along . . . We work together you know." (pp. 4.86-4.87)

Jannotti's attitude toward the payment of money is summed up in his statement, after one of Wald's references to the Arab psychology and way of doing business:

> "Well, you know eh, just on the basics of what you said and what they want to do, it's enough for me to get on the floor and argue. I don't have to, even care what else they want to come up with. My basic point is, the fact that eh, ah what's coming in here, and this has been our job, to bring as much business and, eh tax base and employment to the City of Philadelphia. If that's the way they want to do business, that's all right too." (Trial Tr. pp. 4.64-4.65)

When, at the close of the interview, the agents handed Jannotti an envelope containing $10,000 in cash, and sought to obtain his acknowledgement that he knew the amount of money in the envelope and was satisfied with the arrangement, Jannotti stated, on three different occasions, "We won't even discuss it" (p. 4.88).

It is the basic position of the Government that, since both of the Philadelphia congressmen who had earlier accepted payments for assistance in immigration matters had expressed interest in having the Arabs invest in worthwhile projects in their respective districts, and since Criden had bragged about his contacts with highly placed officials in the city government, the fictitious hotel project was put forward for the purpose of determining which officials would have to be dealt with on a corrupt basis in furtherance of such a project. Ostensibly, the aim was to learn which city officials would ask for payoffs. But the evidence plainly makes that theory completely untenable: Neither Schwartz nor Jannotti asked for money; both made it clear that no payments were necessary; the idea of paying money originated with the agents; and it was the agents who insisted that, unless the payments were accepted, their principals would be unwilling to proceed with the project in Philadelphia.

It is thus very clear that neither defendant could properly be convicted unless the evidence proved predisposition beyond a reasonable doubt. And in my judgment, there is no evidence whatever in this case tending to show that, when the Government's overtures first came to the attention of the defendants, they were already predisposed to accepting bribes. The Government made no attempt to establish predisposition through extrinsic evidence. Both defendants presented impressive evidence of a good character, none of which was challenged by the Government. For proof of predisposition, the Government relies exclusively upon the fact that each defendant did accept money.

Ordinarily, of course, if the Government induces a defendant to commit a crime, the Government cannot establish predisposition merely by showing that the defendant did commit the crime. If that were sufficient, there would never be any need to prove predisposition, and there would be no such thing as an entrapment defense. In some situations, however, a defendant's ready acquiescence in the Government's suggestion may be enough to justify a finding of predisposition. Or, in the course of committing this particular offense, a defendant may exhibit such familiarity with criminal techniques and procedures as to demonstrate previous experience with similar criminal activity. In the present case, neither defendant said or did anything tending to establish preexisting criminal inclination, other than his acceptance of the money.

In my opinion, in their zeal to make sure that the defendants would accept the tendered payments, the government agents offered such attractive inducements as to preclude any reliance upon the defendants' acceptance of the money as proof of predisposition. In the first place, the amounts offered were exceedingly generous. Standing alone, the very amounts of the bribes were, to paraphrase the language of the court in *Scriber v. U.S.*, *supra*, "a substantial temptation to a first offense."

In the second place, it was clear that the defendants would not be asked or expected to do anything improper on behalf of the proposed hotel venture; and they agreed to do nothing inconsistent with their obligations as members of the City Council, working for the benefit of their constituents.

Finally, and most importantly, they were led to believe that if they did not accept the money, the project would not come to Philadelphia. In the context of the fiscal crises which beset all large cities these days, and in the context of the problems of urban blight and decay, the governmental inducement in this case was indeed calculated to overwhelm.

Viewed in its entirety, the Philadelphia aspect of the Abscam investigation was plainly designed not to expose municipal corruption, not to determine which officials were corrupt, but merely to ascertain whether, given enough inducement, city officials could be corrupted. And what the Government succeeded in proving was, not that the defendants were corrupt city officials, but that, exposed to strong temptation, they could be rendered corrupt. In short, the evidence establishes entrapment as a matter of law. The evidence was, as a matter of law, insufficient to establish the defendants' predisposition beyond a reasonable doubt.

The defendants are therefore entitled to judgments of acquittal, unless the Government is correct in its remaining contentions, namely, that the defendants are precluded from raising an entrapment defense because they did not concede every essential element of the crimes charged against them; and that, in any event, the defendants responded to inducements offered by Howard Criden, not by the Government. These contentions will now be addressed.

Availability of the Entrapment Defense. It has been the consistent position of the Government throughout this case that the defendants were not entitled to assert the defense of entrapment at all, since they did not concede every essential element of the crimes charged against them. Specifically, the defendants did not concede that their receipt of the payments from the undercover agents amounted to extortion under the Hobbs Act, nor did they concede the jurisdictional element of potential impact upon interstate commerce under that Act, or the enterprise and pattern elements of the RICO conspiracy charge. The Government relies upon a series of cases in this circuit which, at first blush, appear to stand for the broad proposition that, in order to raise an entrapment defense, a defendant must admit each and every essential element of the crime charged. *U.S. v. Watson*, 489 F.2d 504 (3d Cir. 1973); *Government of the Virgin Islands v. Hernandez,* 508 F.2d 712, 1717 (3d Cir. 1975) (footnote); *U.S. v. Levin,* 606 F.2d 47 (3d Cir. 1979); *U.S. v. Shoup,* 608 F.2d 950 (3d Cir. 1979). Here again, however, the decisions must be read in the light of the facts of the cases being decided. In *Watson,* the court held that a defendant charged with unlawful use of telephone facilities in carrying out a narcotics conspiracy could not claim entrapment if he denied having made the telephone call in question. In both the *Hernandez* and *Shoup* cases, the defendants contested every essential element of the crimes charged. The *Levin* case holds merely that a defendant is not entitled to an entrapment charge unless he expressly raises the entrapment defense in a timely fashion, so that the Government will have an opportunity to confront the issues at trial.

In none of the cited cases, nor in any other case that has come to my attention, has the Third Circuit Court of Appeals been squarely presented with the question of the availability of an entrapment defense to a defendant who, while admitting the operative facts, disputes *mens rea*, or challenges a jurisdictional element. I am reasonably confident that, properly understood, the Third Circuit cases go no further than to establish that a defendant must admit whatever action he claims to have been entrapped into performing.[5]

Some hypothetical examples may be useful: Suppose that an undercover government agent posing as a physician in the throes of a heart attack on a public street induces a passing nun to deliver a package, representing that the package contains life-saving medicines urgently required by a patient. The package actually contains heroin. Must the nun admit that she knew the package contained heroin, in order to assert the defense that she was entrapped into making the delivery? Surely not.

Suppose a defendant breaks into a house late at night, in response to frantic calls for help from an occupant who, it turns out, is a government agent merely pretending distress in order to ensnare. I do not believe the defendant would have to admit he intended to commit a felony in order to claim entrapment as a defense to a burglary charge.

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[5] So far as I am aware, no support for the Government's position is to be found in any decision of the Supreme Court.

I have no doubt that, if squarely confronted with the issue, the Third Circuit Court of Appeals would find persuasive the reasoning of Judge Hufstedtler, writing for an *en banc* court which was unanimous on these issues, in *U.S. v. Demma,* 523 F.2d 981 (9th Cir. 1975). As noted in that opinion, rigorous enforcement of a rule requiring a defendant to admit every essential element of the offense in order to plead entrapment would be in direct conflict with the decision of the Supreme Court in *Sorrells v. U.S.*, 287 U.S. 435 (1932) and the later entrapment cases (holding that the entrapment defense may be asserted under a plea of not guilty, and need not be specially pleaded as a plea in bar), and would also raise serious constitutional questions.

As I understand it, the justification for the general rule advanced by the Government stems from the notion that a defendant should not be permitted to blow hot and cold; while inconsistent defenses may generally be permissible in criminal cases, there is an exception when the conduct of law enforcement officers is attacked. While this rationale is not universally accepted (for example, it was rejected by a majority of the court in *Demma*), I believe it does reflect the current state of the law in this circuit. But I am satisfied that our Court of Appeals would not extend the rule beyond its justification, to preclude assertion of an entrapment defense where no inconsistency would be involved.

The gist of the entrapment defense is that the Government improperly induced the defendant to commit a crime when, in the absence of such inducement, the defendant would not have been likely to commit that crime or any other crime of that type. In order to sustain a conviction, the Government must prove each and every essential element against the defendant beyond a reasonable doubt. There is neither factual nor legal inconsistency when a defendant takes the position, "I do not agree with the Government's claim that I performed acts A and B. I admit that I did do act C, but I was entrapped into doing it." If acts A, B and C are all essential ingredients of the crime charged, the defendant is entitled to acquittal if there is a reasonable doubt as to any of the essential elements, that is, reasonable doubt as to whether he committed acts A or B, or reasonable doubt as to whether his performance of act C was the result of entrapment. Any contrary rule would do violence to fundamental constitutional concepts.

Moreover, it should be noted, a contrary rule would provide a powerful incentive to prosecutors to multiply or exaggerate the charges whenever the circumstances might suggest the existence of a legitimate entrapment defense.[6] It should be noted, also, that the entrapment defense provides protection only with respect to those acts the defendant was entrapped into performing. For example, a drug user who is entrapped into distributing can still be convicted of the possessory offense, or any other lesser included offense not tainted by the entrapment.

In the present case, neither defendant has taken a truly inconsistent position. Both defendants admitted performing the acts which they claim they were entrapped into performing. They were therefore not precluded from asserting the entrapment defense.

Governmental Responsibility for Inducement. The Government is undoubtedly correct in its assertion that a person induced to commit a crime by a third party not acting at the direction of the Government cannot assert the entrapment defense. *Crisp v. U.S.*, 262 F.2d 68 (4th Cir. 1958); *and see U.S. v. Twigg,* 588 F.2d 373 (3d Cir. 1978). But that rule has no application in the present case, since (1) Criden acted with the knowledge and largely at the direction of the government agents, and the government agents were the source of the representations which created the inducement, (2) the agents plainly had knowledge of, and ratified, Criden's representations, and (3) in any event, the conduct of the agents themselves, in their dealings with the defendants, constituted entrapment, in and of itself.

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[6] It should be noted that, even under the Government's theory, the entrapment defense would be available with respect to the predicate offenses under RICO. If the Government were correct, it would mean that defendants who were entrapped into committing bribery under state law could be deprived of the defense by the simple expedient of charging them under federal statutes such as RICO and the Hobbs Act.

In *Sherman v. U.S., supra,* the Supreme Court unanimously held that there was entrapment as a matter of law, even though the Government had no knowledge of the inducement (by a third party informant) until after it had occurred. As set forth in Note, "The Defense of Entrapment," 73 Harv.L.Rev. 1333:

> "When persons who are not law enforcement officials act with official encouragement or assistance, they should be treated as government agents for purposes of the entrapment defense. Otherwise, its protection could be avoided by indirection [at p. 1341, citing *Sherman*] . . .
>
> "Most cases accept without discussion the proposition that persons promised rewards by the police for procuring arrests are government agents [ftn., at p. 1341] . . .
>
> "The only two cases which have been found dealing with the question of Government inducement of a third party to procure the commission of a criminal offense by a particular defendant when the third party has no knowledge of the law enforcement object of the inducement have held that the third party is a

> government agent for purposes of the entrapment defense. Despite his lack of intent to secure the defendant's arrest, his agency in such a situation seems apparent [at pp. 1341-42, citing *U.S. v. Klosterman,* 248 F.2d 191 (3d Cir. 1957); *U.S. ex rel. Hassell* [*Hassel*] *v. Mathues,* 22 F.2d 979 (E.D. Pa. 1927)]."

I am satisfied therefore, that the Government must be held responsible for the entrapment disclosed by the evidence in this case.

IV. DUE PROCESS

As discussed in Part II of this Opinion, a majority of the members of the Supreme Court have expressed views which leave open the possibility that even a predisposed defendant must be acquitted if the conduct of the government agents was so outrageous as to amount to a violation of due process. To date, the Supreme Court has not yet found it necessary to dispose of any case on that basis, although it is perhaps arguable that some of the earlier entrapment decisions, and several lower court decisions purporting to apply supervisory-power analysis, have roots in due process concepts.

In *U.S. v. Twigg, supra,* a case decided after *Russell* and *Hampton,* the Court of Appeals for the Third Circuit reversed a conviction and dismissed the indictment, on due process grounds, because of excessive creative involvement on the part of the Government. In that case, the Government supplied essential ingredients and equipment, and government agents were the prime movers in setting up and operating an illicit methamphetamine laboratory. And in *U.S. v. Archer,* 486 F.2d 670 (2d Cir. 1973), cited with approval in the concurring opinion in *Hampton,* the court expressed the view that dismissal on due process grounds would be appropriate where the undercover work of the government agents included the commission of several independent crimes, including perjury before a grand jury.

The rationale of the *Twigg* decision appears closely related to the rationale of typical entrapment cases. Although the court made clear that its decision was *not* based on entrapment—the defendants were shown to have been predisposed, and the involvement of one of the defendants was in no way attributable to the Government—the central theme of the majority opinion is that, even though predisposed, the defendants had in fact been induced to commit a crime they would not otherwise have been likely to commit. The court quoted the following language from its earlier decision in *U.S. v. West,* 511 F.2d 1083, 1085 (3d Cir. 1975):

> ". . . Moreover, such conduct does not facilitate discovery or suppression of ongoing illicit traffic in drugs. It serves no justifying social objective. Rather, it puts the law enforcement authorities in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing."

And from the Ninth Circuit's decision in *Greene v. U.S.*, 454 F.2d 783, 787 (9th Cir. 1971):

> ". . . But, although this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative."

The court noted that Judge Powell's plurality Opinion in *Hampton* cited the *Greene* case with approval, and stated:

> "We are adhering to Justice Powell's reasoning that in evaluating whether Government conduct is

> outrageous, the court must consider the nature of the crime and the tools available to law enforcement agencies to combat it." (588 F.2d, at p. 378, n. 6.)

The court distinguished *Hampton*, in the following language:

> "*Hampton* was concerned with the sale of an illegal drug, a much more fleeting and elusive crime to detect than the operation of an illicit drug laboratory. In such a situation the practicalities of combating drug distribution may require more extreme methods of investigation, including the supply of ingredients which the drug ring needs [footnote omitted]. Furthermore, a reading of the jury instruction requested by the defendant in *Hampton* reveals that he was concerned merely with the principle that if the narcotics were supplied to him by an informant acting on behalf of the Government, then he must be acquitted as a matter of law . . . In this case, however, we are not only concerned with the supply by government agents of necessary ingredients for manufacture, but we also have before us a crime, unlike *Hampton*, conceived and contrived by government agents." (*Id.*, at p. 378.)

In my judgment, the circumstances of the present case argue more strongly for dismissal on due process grounds than the *Twigg* case. While municipal bribery may be "fleeting" and "elusive," so that governmental subterfuge and even creative involvement may be necessary to combat it, the techniques employed here went far beyond the necessities of legitimate law enforcement. It would undoubtedly be permissible for government agents to set up an undercover business entity, either real or imaginary, as an attractive target for corrupt overtures by city officials, and even to hint that such overtures would be welcome. It would also probably be permissible for the undercover agents to initiate bribe proposals, at least in connection with suspected ongoing corrupt activities on the part of the targeted officials. But it is neither necessary nor appropriate to the task of ferreting out crime for the undercover agents to initiate bribe offers, provide extremely generous financial inducements, and add further incentives virtually amounting to an appeal to civic duty. In short, even if the entrapment issues were properly submitted to the jury in this case (and I have concluded that they should not have been), and even if the jury properly resolved them (and I have concluded that the evidence was insufficient as a matter of law), I am persuaded that the *Twigg* decision compels that judgments of acquittal be entered.

In *U.S. v. Archer, supra,* Judge Friendly expressed the view that the federal courts should not sanction the artificial federalization of purely state crimes. The rationale of that decision is equally applicable in the present case. Bribery is punishable under state law. When there is a pattern of bribery affecting interstate commerce, the RICO statute may properly be invoked, and its (greatly enhanced) penalties applied. But in the present case, it was the Government, and the Government alone, which created the pattern, as well as each bribe. The receipt of a bribe by each of these defendants would not have violated the RICO statute, but for the Government's having made sure that Criden was involved in other bribe activities.

Moreover, to permit this kind of artificial federalization would effectively remove virtually all of the limitations upon the criminal jurisdiction of federal courts, and would be utterly contrary to accepted notions of federalism. I do not mean to suggest that municipal corruption can never be a proper object of the attention of federal law enforcement officers. But whatever may be the appropriate role of federal law enforcement in detecting and punishing municipal corruption, it is surely not within the legitimate province of federal agents to embark upon a program of corrupting municipal officials, merely to demonstrate that it is possible.

The defendants have presented several additional arguments in support of their due process contentions. Because these additional arguments are advanced by all four defendants, and because this Opinion deals only with the cases of the defendants Schwartz and Jannotti, these additional matters will be addressed in a separate opinion, which will be filed in due course.[7]

V. CONCLUSIONS

The conclusions expressed in the foregoing Opinion may be summarized as follows:

1. The evidence at trial did not establish actual or potential impact upon interstate commerce necessary to sustain the jurisdiction of this Court under the Hobbs Act, hence Count III of the Indictment must be dismissed for lack of jurisdiction, and the convictions on that count set aside.

2. The evidence at trial sufficed to establish each of the essential elements of the RICO conspiracy charge alleged in Count II of the Indictment.

3. Both defendants are entitled to judgments of acquittal on the ground that the evidence at trial established entrapment as a matter of law.

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[7] The entrapment defenses asserted by the defendants Criden and Johanson cannot be addressed at this time, since they have not yet been tried on this Indictment. And the application of the *Twigg* and *Archer* doctrines to the cases of Criden and Johanson involve somewhat different considerations than in the cases of Schwartz and Jannotti.

a. The defense of entrapment is available to the defendants, since its assertion involved no inconsistency in fact or in law.

b. The Government is, as a matter of law, responsible for the actions of Criden and the undercover agents amounting to inducement.

c. The evidence at trial was, as a matter of law, insufficient to establish beyond a reasonable doubt that the defendants were predisposed.

4. Alternatively, the defendants are entitled to judgments of acquittal on the ground of governmental overreaching amounting to a violation of due process of law.

5. Alternatively, the defendants are entitled to judgments of acquittal on the ground that the circumstances relied upon to establish federal jurisdiction over the offenses charged were artifically created by the Government in an attempt to exceed the proper scope of federal law enforcement.

These conclusions have been reached with great reluctance. No-one who has viewed the videotape evidence in this case could avoid feelings of distress and disgust at the crass behavior the tapes reveal. The jury's verdict represents a natural human reaction to that evidence. But, in the long run, the rights of all citizens not to be led into criminal activity by governmental overreaching will remain secure only so long as the courts stand ready to vindicate those rights in every case.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 80-166

UNITED STATES OF AMERICA

v.

HARRY P. JANNOTTI
GEORGE X. SCHWARTZ

ORDER

AND NOW, this 26th day of November, 1980, it is ORDERED:

1. The verdict of the jury in this case is set aside in its entirety.

2. Count III of the Indictment is DISMISSED for lack of jurisdiction.

3. The respective motions of the defendant George X. Schwartz and Harry P. Jannotti for judgment of acquittal are GRANTED.

/s/ JOHN P. FULLAM
J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1020 and 81-1021

UNITED STATES OF AMERICA,
Appellant in No. 81-1020

v.

HARRY P. JANNOTTI

(D.C. Crim. No. 80-00166-02)

UNITED STATES OF AMERICA,
Appellant in No. 81-1021

v.

GEORGE X. SCHWARTZ

(D.C. Crim. No. 80-00166-04)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PRESENT: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and SLOVITER, *Circuit Judges*.

ORDER

A majority of the active judges having voted for rehearing in banc in the above appeal, it is

ORDERED that the Clerk of this Court list the above case for rehearing before the court in banc at the convenience of the Court.

BY THE COURT,

COLLINS J. SEITZ
Chief Judge

DATED: August 26, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1020/81-1021

UNITED STATES OF AMERICA,
Appellant in No. 81-1020

v.

JANNOTTI, HARRY P.

(D. C. Criminal No. 80-00166-02)

UNITED STATES OF AMERICA,
Appellant in No. 81-1021

v.

SCHWARTZ, GEORGE X.

(D. C. Criminal No. 80-00166-04)

(D. C. Criminal No. 80-00166-02 and 04)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Eastern District of

Pennsylvania and was argued by counsel on June 10, 1981 and reargued before the Court in banc on November 23, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court dated November 26, 1980 and entered November 28, 1980, dismissing Count III of the indictment and granting judgments of acquittal, be, and the same are hereby reversed, and the said District Court is directed to reinstate the jury's verdict.

ATTEST:

SALLY MRVOS
Clerk

February 11, 1982

(Recess at 4:10 o'clock P. M. until 4:25 o'clock P. M.)

FULLAM, J.: Members of the jury, you are about to deliberate and reach a verdict or attempt to reach a verdict in this case; and I want to emphasize at the very outset that this is a very important function that you are to perform. You people are the judges of the facts of the case. You decide what happened, what didn't happen, with what motives or intent things happened. In short, all factual questions are for you to reslove; and what you say about the facts is the final decision as to the facts.

And that carries with it the important responsibility for evaluating the evidence and deciding what evidence is reliable, what evidence is not reliable, which witnesses are to be believed, which witnesses are not to be believed and so forth. And nothing which I say in the course of this charge is intended to express any opinion of my own about how you should resolve these factual disputes nor is it intended to express an opinion as to how you should evaluate the evidence.

If in the course of the trial I say anything which you interpret as expressing a view of my own, I want to emphasize that it is not my intention to express any opinion. And, even more important, if I should express an opinion, you are not bound by it and should disregard it. It is what you collectively conclude as to the facts that governs, and that is entirely your function and not mine.

For that reason, the arguments of counsel do not constitute evidence in the case. They serve a valuable function in that they present the opposing viewpoints as to what your verdict should be, and they make arguments based upon the evidence. They suggest what inferences you should draw from the evidence and so forth, and that is a perfectly appropriate function for counsel to perform on both sides. But what they say does not change the evidence, and it does not add to it or detract from it.

So that you accept your collective recollection of the testimony of witnesses and your collective evaluation of the weight to be given to the evidence and form your own judgments as to the facts of the case.

I say this is a very important task. I would venture to say that it is no exaggeration to suggest that this is probably the most important task you will perform in the course of your lives. It is a very serious and solemn obligation which you have, and I am sure that you will carry it out in accordance with your oaths.

This is a criminal case. The defendants are charged with crime; and in any criminal case, including this one, the burden of proof is upon the Government.

Before the Government can obtain a conviction in a case, it must satisfy you beyond any reasonable doubt as to each and every essential element of the crime charged. It must satisfy you that the defendant whose case you are considering is beyond any reasonable doubt guilty of every essential element of the crime charged.

There is no burden on the defendants to prove their innocence. There is no burden on the defendants to prove anything. Rather, the burden is on the Government and remains on the Government throughout the trial of the case.

The defendants stand before you presumed to be innocent, and that presumption of innocence continues with them unless and until the evidence as a whole convinces you beyond a reasonable doubt that they are in fact guilty.

What I have said about the burden of proof is simply another way of pointing out that there is no obligation on the defendants to present evidence or to present testimony. And you are not permitted to draw any adverse inferences from the failure of a defendant to testify or to present evidence.

When a defendant does present evidence, as they have in this case, that evidence is to be considered along with all the other evidence in the case. The ultimate issue when you view and consider all of the evidence, no matter which side presented it, the question is: Does the evidence prove beyond a reasonable doubt that the defendants are guilty? Does it establish their guilt of each and every essential element of the crime charged beyond any reasonable doubt?

Now, I have mentioned reasonable doubt several times; but I haven't told you what that is. And I think it will comes as no surprise to you to learn that so far as the law is concerned a reasonable doubt means about what it says, it is a doubt which is well-founded in reason and common sense, a doubt which arises from the evidence in the case or from the lack of evidence in the case, and it is the sort of doubt which would cause a reasonable person such as yourselves to hesitate and seriously consider before reaching a decision in some matter of great importance in your own lives.

If after you have considered the evidence you have that kind of doubt as to the guilt of the defendant whose case you are considering, then you must return a verdict of not guilty.

If, on the other hand, after you have considered all of the evidence you do not have any reasonable doubt but are rather satisfied and convinced beyond a reasonable doubt that the defendant is guilty as charged, then you have the right to return a verdict of guilty.

Your verdict must be unanimous. You must all agree upon a verdict before you can return a verdict; and the corollary of that, of course, is that each and every member of the jury must be personally convinced beyond a reasonable doubt before you can return a verdict of guilty.

If a particular juror after considering all of the evidence in the case and listening attentively to the views of his fellow jurors is nevertheless not persuaded beyond a reasonable doubt that the defendant is guilty, then it is the obligation of that juror to vote for acquittal.

Only if all of you agree that the case has been proved beyond a reasonable doubt can you return a verdict of guilty.

I have told you that the Government must prove each and every essential element of the crime now charged, and I now propose to discuss with you just what the elements are of the crimes charged against these defendants. Here is where it gets a little technical, but I want you to pay close attention because it is extremely important to know what it is the defendants are charged with having done.

There are two basic sets of charges against the defendants. The second count of the indictment charges both defendants with conspiracy to violate the racketeering statute, the R-I-C-O or RICO statute, and the third count charges both defendants with conspiring to obstruct interstate commerce through extortion in violation of the Hobbs Act.

I am going to tell you in just a few moments what each of those statutes provides and what the essential elements are under each statute.

Preliminarily, let me point out that this is a Federal Court. We do not have general jurisdiction over crimes. Generally speaking, most of the activity that you think of as criminal is to be prosecuted in the State Courts: robbery, murder, burglaries, that sort of thing.

The charge of bribery is a crime under state law and is normally prosecuted in State Courts.

Federal Courts have jurisdiction only with respect to the federal aspects of crime. And essentially for purposes of this case that means that there must be some connection with interstate commerce. The federal prosecutors have jurisdiction to investigate crimes which are federal crimes. They do not have jurisdiction to investigate and prosecute crimes which are state crimes.

Federal Courts have jurisdiction to conduct trials of cases involving charges of federal crime. They do not have jurisdiction over cases of state crime.

I am now going to read briefly the pertinent portions of the statute which is alleged to have been violated in each of these two counts.

The racketeering statue or the RICO statute provides that: "It shall be unlawful for any person employed by or associated with any enterprise, engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity."

A pattern of racketeering activity is defined to mean two or more acts of racketeering, and racketeering is defined to include an offense involving bribery which is unlawful under state law.

The defendants are charged with conspiracy to violate that statute. In order to obtain a conviction under the second count of this indictment, the Government must establish the following essential elements beyond any reasonable doubt. They must establish that the law firm of Criden, Johanson, Morrissey, Dolan & Cook was an enterprise engaged in or whose activities affected interstate commerce.

Now, on that subject you will recall there is evidence to the effect that there was a law firm or an association of individuals designated as a law firm, and there was evidence to the effect that the law firm represented clients from other states and that it had interstate dealings and that it purchased supplies from out of state vendors and so forth. If you accept that evidence as correct, then you would be justified in concluding that the law firm of Criden, Johanson, Morrissey, Dolan & Cook was indeed an enterprise whose activities affected interstate commerce.

The next element which the Government must prove beyond a reasonable doubt is that Howard Criden participated in conducting the affairs of that law firm through a pattern of bribery in violation of state law; that is, that Criden in participating in the conduct of that law firm engaged in two or more acts of bribery in violation of state law.

Under state law bribery is defined to include anyone who solicits, accepts or agrees to accept money as consideration for his decision, recommendation, or vote as a public servant.

A public servant includes a member of the City Council of Philadelphia.

So the issue there would be: Did Howard Criden participate in two or more acts in which somebody solicited, accepted, or agreed to accept money as consideration for his decision, recommendation, or vote as a public servant? The statute goes on to say that it includes "anyone who solicits, accepts, or agrees to accept any valuable benefit including money as consideration for any violation of a known legal duty as a public servant."

The issues with respect to that element of the crime are in two areas: The first is if you find that Criden did participate in two acts of bribery — that is, specifically as charged in the indictment, the receipt of money by Johanson on the 18th and by Schwartz and Jannotti on the 23rd or whatever the dates were — was the money received or agreed to be received as consideration for the decision, recommendation or vote of the Councilman involved or as consideration for a violation of a known legal duty of that Councilman?

And I will discuss that question of the purpose of the payment in more detail a little bit later, but that is one set of issues.

The other set of issues has to do with whether Criden did participate in two or more acts of bribery as thus defined. Was it done in conducting or participating in the conducting of the affairs of the law firm?

And you will recall that the evidence on that subject is that the money which Criden himself received was put in a safe deposit box in the names of Criden, Johanson and Cook and that it was not deposited in the general fund of the law firm and that the only time any of that money got into the law firm was when on a later occasion the law firm needed some operating cash and Criden instructed Cook to take $2,000 or $2,500 of the money and put it into the law firm in a fictitious way, reporting it as if it had been paid by a client where it actually hadn't.

In short, if Criden did participate in the bribery activity, was he doing that in the course of carrying out the affairs of the law firm? And you have heard the arguments both ways on that subject.

The third essential element of the crime charged in the second count is that it must be proved beyond a reasonable doubt that the defendant whose case you are considering conspired with one or more other persons and that an object of the conspiracy was the understanding that Criden would participate in conducting the affairs of the law firm through a pattern of bribery.

Now, I have used the word "conspiracy" several times here, and I think it is important that I now define what a conspiracy is. A conspiracy is simply an agreement or understanding between two or more persons to commit an unlawful act.

Some examples may be helpful. If you and I decide here and now that we are going to rob a bank, we haven't yet committed a crime. But if in furtherance of that agreement we do an act in furtherance of the conspiracy, then that makes the conspiracy complete and we would be guilty of a crime even though we later changed our minds and never did get around to robbing the bank.

So, for example, if you and I agreed here and now tomorrow morning we are going to go across the street and rob a bank, we haven't yet committed a complete crime. But if after making that agreement one of us goes over and looks in the window to see what the physical set-up is or one of us goes out and buys a ski mask that we will use in the bank or one of us goes out and gets a handgun, any overt act to carry out the agreement would make the agreement complete; and then we would be guilty of conspiracy even though between now and tomorrow morning we might change our minds and decide not to do it.

And, of course, if after entering into the agreement we proceeded to rob the bank, then we would be guilty not only of conspiracy but also of the substantive offense of bank robbery.

In order to be guilty of conspiracy, the defendant must act knowingly. He must know that he is agreeing with somebody to do the unlawful act charged; and he must act willfully — that is, with the knowledge what he is doing is unlawful. Willful means simply intentionally and with knowledge that it is improper.

It is not enough for the Government to prove that a defendant knew that two other people had conspired. It must appear that the defendant whose case you are considering himself agreed knowingly to join the conspiracy, to enter into the combination with one or more other persons.

Now, it is not essential that every participant in a conspiracy be fully aware of all of the ramifications of the conspiracy. It is no defense to someone who knowingly conspires with another to commit an unlawful act that he did not know that a third party was involved or that he did not know exactly everything that was going to happen in carrying out the act. But it must be shown that he did act knowingly, that he knew that he was entering into an agreement to do something illegally, and that he acted knowing that that was unlawful.

As applied to the facts of this case, you will recall that there is evidence to the effect that Jannotti may not even have realized that Criden was a lawyer and there is evidence from which you might very well conclude that Mr. Jannotti did not even know there was a law firm and certainly did not know that Criden was acting on behalf of the law firm.

In order to be convicted of a conspiracy to violate the RICO statute, it is essential that the Government establish that the defendant at least knew that the object of the conspiracy was to carry out a pattern of two or more acts of racketeering and that was done in furtherance of the affairs of an enterprise. It is not essential that every conspirator know the precise identity, name and office address of the enterprise whose affairs are being conducted; but it is essential before there can be a conviction that he must know that indeed there is an enterprise whose affairs are being conducted.

So to summarize with respect to the second count, the essential elements which must be proved by the Government are, first, that there was a conspiracy of which the particular defendant whose case you are considering was a knowing and intentional participant, that the object of the conspiracy was to enable Mr. Criden to assist and participate in the carrying out of the affairs of an enterprise through a pattern of racketeering activity — namely, bribery, that is, two or more acts of bribery.

It must be established that indeed there was an enterprise and that the enterprise was the one charged in the indictment — namely, the law firm of Criden, Johanson, Morrissey, Dolan & Cook — that its affairs affected interstate commerce and that Mr. Criden did in fact participate in two or more acts of bribery in violation of state law and that he did so in conducting or participating in the conduct of the affairs of the law firm when he did that.

Now, with respect to the next set of charges, those embraced in the third count, that is as I said earlier, that charges the defendants with a conspiracy to obstruct interstate commerce through extortion in violation of the Hobbs Act. And I will read to you what the statute says on that subject.

The Hobbs Act makes it a crime — it is phrased the other way aroung — "Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by robbery or extortion or attempts or conspires so to do is guilty of a crime."

As used in that statute the term "extortion" means the obtaining of property from another with his consent induced by wrongful use of actual or threatened force, violence or fear or under color of official right.

What the Government charges here is that the defendants conspired to obstruct commerce through extortion — namely, the obtaining of the money from the undercover agents with the consent of the agents, which consent was induced under color of official right. "Under color of official right" means simply that the money must have been paid which was not lawfully due to the office holder. The defendant who received the money must have been in an official position and that the money received was not lawfully due by virtue of that office and that the consent of the person paying the money was induced by the fact that this person did hold public office.

In short, it is very similar to the bribery under state law which I discussed earlier — namely, that the payment must have been made in order to influence the official actions of the person receiving the money.

In order to justify a verdict of guilty under the third count, the Government must prove beyond a reasonable doubt that the hotel project, if it had been genuine, would have involved interstate commerce and the Government must prove that the defendant whose case you are considering conspired with one or more other persons to commit extortion which would have affected interstate commerce; that is, that a natural and probable consequence of the extortion, the receiving the money, would have been to affect interstate commerce.

First of all, let me say that in deciding this interstate commerce aspect of the Hobbs Act-conspiracy charge, you are to put yourself in the frame of mind that assuming that this had been a genuine hotel project — in other words, you view it from the perspective of the defendants and from their perception the persons they were dealing with were representatives of wealthy Arab businessmen and they wanted to build a hotel complex or hotel project — assuming those facts to be so then the question is: By receiving these bribes, these payments, did they do something which would naturally and reasonably be likely to have as a consequence an adverse affect on interstate commerce?

Under the law it is not necessary that the effect on interstate commerce be substantial. Any minimal effect is enough and the theory of the Government here is by receiving $30,000 in one instance and $10,000 in the other instance — assuming this had really be a hotel project — that would have some effect on interstate commerce in that it would have meant that there was much less money available for the construction of the project which, under the Government's theory, would have involved interstate movement of supplies and materials and interstate activity generally.

In short, it is the position of the Government that the fictitious hotel project was involved in interstate commerce, did involve interstate commerce. The construction of the hotel would have involved purchases of supplies and materials from out of state and that the receipt of payments which the Government characterizes as bribes in the sums of $30,000 in one instance and $10,000 in the other would have had an effect, however minimal, on interstate commerce.

I have got so many books here I am going to start dropping them pretty soon. I have now reviewed with you what the essential elements of the crimes charged are.

Before you can return a verdict of guilty as to either count, you must be satisfied beyond any reasonable doubt that each and every essential element has been proved against the defendant whose case you are considering.

Simply to shorten things and for clarity, let me make it very clear at this point that you are to consider each charge separately. You are entitled to reach a verdict of guilty as to some charges and not guilty as to others, guilty as to one defendant and not guilty as to another defendant, or guilty as to everything or not guilty as to everything; and just how you evaluate it is entirely up to you. I want to make sure that you understand that you consider each charge against each defendant separately.

On that subject there is a point which I want to get across; and that is that if it is a principle of our law that when there is a conspiracy, when the evidence proves that there is a conspiracy, that the defendant whose case you are considering was involved in a conspiracy, then any statement made by another member of the conspiracy which is made in furtherance of an object of the conspiracy may be considered as evidence against all of the persons involved in the conspiracy.

I think you understand that ordinarily under our law what A says about B not under oath and not in the courtroom is hearsay and it is not to be considered as evidence against B, and anything which A may have said outside the Court whether it is about B or not, if it is simply a hearsay statement it does not constitute evidence against anybody.

The exception which is made in the case of conspiracy is that if there is proof apart from such statements of the existence of the conspriacy and the defendants participate in it, then any statement made by any other member of the conspiracy which is made in furtherance of the objects of the conspiracy may be considered as evidence against all of the persons involved in the conspiracy.

But unless you are satisfied by other evidence, by non-hearsay evidence, that there is a conspiracy in which the defendant is a participant, you must disregard any statements made by other persons allegedly members of the conspiracy.

Specifically as it applies to this case, the evidence which has been presented here in the courtroom in the form of videotapes and the live testimony of witnesses here in the courtroom, unless that convinces you that a particular defendant was a member of a conspiracy, then the evidence on the tapes concerning what Howard Criden said may not be considered against that defendant.

The defendants have produced evidence of their good reputation in the community, and I want to emphasize so far as the law is concerned reputation evidence is to be considered as substantive evidence just like any other evidence in the case. The law does not regard evidence of good character or good reputation as merely a makeweight or something which is brought in for the purpose of engaging your sympathies but, rather, it is substantive evidence which goes directly to the question of guilt or innocence.

Under the law, it is considered that a person who has a good reputation for being a law-abiding citizen, for being an honest person, would be less likely to commit a criminal offense than someone who did not have such a good reputation; and, therefore, it is to be considered along with all of the other evidence in the case in making the ultimate decision as to whether the evidence as a whole, including the reputation evidence, convinces you beyond a reasonable doubt of the defendants' guilt.

Evidence of good reputation in and of itself may be sufficient to raise a reasonable doubt as to guilt and, as I say, should be considered along with all of the other evidence in the case.

The law does not say, of course, that someone who has a good reputation may not be convicted. Presumably everyone who ever committed a crime at some point committed his first crime. A person with a good reputation is not necessarily guaranteed not to have committed the crime charged. It is simply a factor which does weigh in favor of the defendants, and it should be considered carefully by you along with all the other evidence in the case in deciding the ultimate question of guilt or innocence.

The Government relies to some extent upon testimony to the effect that when he was interviewed by FBI agents Mr. Jannotti denied having received any money at this meeting and denied that any assurances were asked for or given and so forth. And the Government relies upon the recognized legal proposition that evidence that a person has falsely denied guilt constitutes some evidence of guilty knowledge or guilty participation. It is a matter for you to consider and to analyze and interpret.

You may bear in mind several principles here. One is denying having done something which it turns out that you did do may give rise to a legitimate inference of guilty knowledge on your part.

On the other hand, there can be situations in which denial of guilt comes as an automatic reaction. Some people in dealing with police officers tend to clam up just as a matter of instinct.

I would also point out that in some situations a person may have strong reasons to deny participation which reasons do not necessarily mean that the person is guilty of every aspect of the crime charged.

To give you a far-fetched example, I suppose if some bank president happened to be visiting a house of ill repute where a murder was committed and he was questioned afterward and falsely denied that he had ever been in the place, that might or might not be persuasive evidence that he had committed the murder.

It might also be that he simply didn't want his wife to find out that he had been there and he had other reasons for trying to cover up and avoid being tagged with implication in the transaction.

The main point I want to make about that evidence of false denial, however, is that in no way does it constitute evidence against the Defendant Schwartz. Obviously what I said about a co-conspirator's statement being evidence against other participants in the conspiracy is only true up until the time the conspiracy is at an end.

Any statement that Mr. Jannotti may have made to the FBI when he was interviewed does not constitute a statement of a co-conspirator and is not evidence against Mr. Schwartz. it is evidence which you may consider only with respect to the case of Mr. Jannotti.

Now, I think I have covered all of the general points except the issue of entrapment. Let me get into that at this point.

Before an issue of entrapment arises and before you have to consider entrapment the evidence must lead you to believe that the Government induced the defendant to commit the crime charged. Inducement may take any one of a number of forms. It may be that the Government excessively participated in the crime itself as, for example, where an undercover drug agent provides the materials with which methamphetamine can be manufactured or helps to set up a laboratory in which it can be manufactured is an active participation in the actual commission of the crime. Inducement may take the form of excessive pressure upon a defendant to become involved in a criminal enterprise.

The issue really is: Is this a crime which would have been committed without the Government's participation or is this something where the idea for committing this particular crime originated with the Government and that it was the Government's idea that this particular crime be committed?

If the Government is responsible for inducement — that is, if the idea for committing the crime originated with the Government, if this specific crime would not have been committed but for the Government's idea and action — then in order to obtain a conviction the Government must go further and must prove beyond a reasonable doubt that the defendant was predisposed to commit crimes of that type.

As I mentioned in the course of the voir dire of the jury, the distinction which we are trying to draw a sharp line between in this situation is the distinction between a case in which the Government merely provided an opportunity to a defendant who was already inclined to commit crimes of this type, provided him with an opportunity to commit a crime of that type. There is nothing wrong with that. A defendant in that situation may properly be convicted regardless of whether there is any evidence of predisposition.

On the other side of the line, however, is the case in which what the Government did was to induce an innocent defendant to commit a crime which he would not otherwise have been inclined to commit.

Now, having stated that distinction, it becomes necessary to refer to the evidence in this case to see how it fits in.

The Government's position, as I understand it, is that the first suggestions of bribing councilmen and of bribing specific councilmen came from Criden and not from the Government; that the first mentions of any particular defendant came from Criden and not from the Government; and that, therefore, whatever inducing was done was done by Criden and not by the Government.

it is an essential point in the issue of entrapment that the Government cannot be charged with entrapment unless the Government agents are the ones who did it or caused it to be done; therefore, if, for example, a Government agent were simply to let it be known that he was willing to buy heroin on the street and a supplier sold him some heroin and the agent said he wanted to buy more and that person went out and made contact with a second supplier and the second supplier came in, neither of those defendants could properly charge the Government with entrapment because all the Government did in the first instance was to afford an opportunity for the sale of heroin and there was no inducement by any Government agent.

Therefore, even if it turned out in recruiting the second supplier the intermediary did all sorts of improper things, made all sorts of extravagant promises or told the second supplier that this was necessary to save the life of a person dying of cancer or something of that nature, any amount of improper inducement by the intermediary would not be binding upon the Government unless the Government knew about it or approved it or directed it.

Now, as opposed to the Government's point of view in this case, however, the defense argues that, as I understand it, really two sets of arguments, one of which is that in the circumstances here Criden was acting with the knowledge and consent of the Government in approaching the two councilmen and that the Government supplied Criden with the story to be told to the two councilmen and, therefore, if that story generates inducement the Government is responsible for it.

The second aspect of that argument is that what occurred in the meetings with the undercover agents themselves amounts to inducement during the meetings by the undercover agents.

One other aspect here which must be considered is the extent of the inducement. Was it inducement or was it merely providing an opportunity?

It would not give rise to a defense of entrapment for a Government agent to provide an opportunity to a City Councilman to solicit a bribe. It would not be entrapment for a Government agent to hint around that he would be willing to pay a bribe to a City Councilman and then wait and see whether the City Councilman asks for the bribe or agrees to accept it.

It would, however, be inducement if the Government agent offered still further inducements. The issue in this case is whether in its totality the conduct of the

Government amounted to manipulating Criden so as to offer inducements to the defendant whose case you are considering to become involved in a crime which he would not otherwise have been likely to be involved in.

The defense argues to you that there were several forms of inducement, that Criden was being paid $5,000 a head for delivering people who could be talked into accepting money, that Criden would not be paid unless they did accept money, and that the Government knowing that turned Criden loose to try to recruit councilmen to come in and accept money.

The defense also argues to you that not only was each of the councilmen offered money but that they were persuaded and cajoled into taking the money, that they were reluctant but their reluctance was overcome by the repeated conduct of the Government agents.

There is the further point, depending on how you interpret the testimony, you might draw the inference that the net effect of the totality of the circumstances considering everything that the agents said in the course of these meetings the defendants were led to believe that unless they were willing to accept money and give assurances this hotel project would not be coming into Philadelphia.

The Government has argued to you that the evidence is not susceptible to that interpretation, that there is not direct evidence to the effect that the only way they would build the hotel project would be if the councilmen would accept money and make assurances. I will leave that dispute of fact to you to resolve.

It is my recollection that there were — well, depending upon how you interpret what was said you could draw either conclusion, and it is up to you to decide which one is appropriate — if I may digress briefly and in a way to comment in an attempt to assist you in evaluating the legal issues here. I think part of the problem is the phraseology which was used by the agents and by Criden and by everybody else involved in these videotaped discussions, such terms as "no problem." Do you interpret that as assurance that the councilmen would cast their votes and would use their influence and would be granting favors to these people or is this simply a statement that in fact a project of this kind would encounter no problems? You can understand that that can be interpreted either way, either an assurance that "we will see to it that you have no problems" and that "we are doing that in exchange for the money we are going to get" or as simply a statement of fact "with a project of this kind there will be no problems because everybody will be in favor of it."

Similarly, with the various forms of expression of assurances of support, was that assurance of support in exchange for the money or was it simply the statement that "this is the kind of project that I am in favor of?"

There were references to "can I deal with so and so" or "we have had a deal." Obviously that is an ambiguous phrase. It can be interpreted either to mean a simple ordinary transaction in common parlance or it can be interpreted to mean the payment of money, the payment of money unlawfully.

Where the people use the expression "can I tell the Sheik that I had a business transaction," do you interpret that as meaning simply what it objectively means; namely, that "we have had a business transaction" or is that a reference to the actual payment of money?

"Can I tell him that I have a friend on City Council," is that simply meaning somebody whose interests have been enlisted in support or somebody who is inclined to favor this kind of a project or does it mean somebody who has been bought off?

How do you interpret the conversations? Do you interpret them as a situation in which the councilmen were giving advice to the Sheik's representatives as to the composition of the Philadelphia City Government and how things went through and what problems they would be likely to encounter or what problems they would be likely not to encounter or were they making pledges of their votes in exchange for money?

These are some of the interpretations of the language used which I suggest to you are appropriate for you to consider.

Whether you consider the second count, the RICO statute, or the third count, the Hobbs Act conspiracy charge, an appropriate starting point would be to ask yourselves — assuming you find, as I take it everybody now agrees, that each of the defendants did in fact receive money on those televised occasions — what was the purpose of that payment? In analyzing that question you, once again, just as you did with interstate commerces, should assume that in fact these really were representatives of a wealthy Arab who wanted to build a hotel project. You view it, in other words, from the perspective of the defendants.

You would ask yourselves at the conclusion of the transaction and in the totality of the circumstances: Did that particular defendant understand that money was being paid to him to influence his vote, to influence his conduct in his official position or was this a situation in which the defendant understood merely that the money was to be paid in order to enable the Sheik's representative to report back to the Sheik that he had made friends in accordance with the Arab way of doing business? That is, in the totality of the circumstances, both the defendant and the Arab representatives understood that the defendant had been bought and that his support or at least assurance of continuing support were based at least in part upon the fact that he had received the money or was this a situation in which it was understood between the representative and the defendant that there was no corruption involved, that this was simply something which was made necessary in order to encourage the Sheik to go ahead with the project but that as between the representatives and the councilmen it was understood that there was no corruption involved?

Another aspect of that which I should point out is so far as the law is concerned if a public official receives money in an attempt to influence his official conduct it is no defense to say: "Well, I would have voted that way anyway" or "This is a good idea." A councilman can be bribed to do something that he would have done anyway. A councilman can be bribed to carry out a perfectly splendid project.

The issue, however, in this case, in view of the evidence in this case, for you to resolve is: Was the understanding that this payment was made to influence the councilman and was received with that understanding?

I should also point out that if a public official does receive money for the purpose of influencing his official conduct — that is, to say if he receives money under color of office — it doesn't matter whether he intended to carry out his promises or not.

If, for example, I were to receive a bribe for promising to decide in favor of the plaintiff in the case that is coming up next week, even if I subjectively had no intent of deciding it otherwise correctly and no intention to be influenced if I nevertheless accepted money which was paid to me for the purpose of receiving that assurance, then I would be guilty of bribery aspect of the RICO statute and of the extortion aspect of the Hobbs Act statute.

I would point out that you are not called upon in this case to express any general approval or general disapproval of the methods employed by the Government. For example, if you have a sort of an inherent objection to people secretly videotaping other people without their knowledge, you don't like that, that is something which you should disregard.

The question here is not the general question of whether it was appropriate for the Government to use the techniques that they used. The question is: What was the actual intent and effect of what the Government did do?

There is absolutely nothing wrong with using undercover activities to investigate an existing criminal activity or to try to obtain additional evidence of a suspected existing criminal enterprise.

If the police were to have reason to believe that somebody was going to rob a bank and that they were going to hire a taxicab to do it, it would certainly be nothing improper with the Government putting a police officer as the driver of the cab and waiting for the bank robbers to hire that cab and then driving to the bank, meanwhile having alerted other police, and let the defendants go in and start robbing the bank and then catch them in the act. That would be perfectly appropriate. That is simply gathering evidence.

That is different, however, from a situation in which the police got up the idea of robbing a bank and went out and tried to induce people not otherwise disposed to rob the bank and set them up and then used the undercover approach to gain evidence.

A reference has been made to the use of so-called "granny cops." There is absolutely nothing improper with police dressing up as little old ladies and waiting to be assaulted and then pouncing on the would-be assaulter and prosecuting that person.

If, however, the undercover "granny cop" approached someone on the street corner and attempted to seduce that person and led that person off into a side alleyway for the purpose of completing the seduction, the police would not be allowed eventually to prosecute that person for the resulting sex act.

So that the issue here is simply: Was there inducement to the defendants to commit this offense, inducement for which the Government is responsible either because of what the Government or agents themselves did or said or is it because of what Criden did or said with knowledge and approval of the Government?

If there was inducement, then the Government cannot obtain a verdict of guilty unless the evidence as a whole proves beyond a reasonable doubt that the particular defendant was predisposed to commit that type of offense.

That brings me to the final item I want to discuss, and that is the question of predisposition. There are various ways in which predisposition can be established, and there are no set rules. It depends entirely upon the circumstances of each case. But generally speaking predisposition can be shown, for example, by proof that the defendant has a history of committing other offenses of that type.

There is no such evidence in this case. There is no evidence that either of the defendants had ever committed any bribery charge before.

There may be in some situations evidence where a defendant can be shown to have expressed an interest in committing crimes of this type or expressed an intent or a plan to embark upon a series of criminal activities. As I recall it, there is no such evidence here.

In some situations predisposition may be shown by the fact that a defendant readily assented to the suggestion of the crime in the case on trial.

I would caution you that in order to find predisposition based merely upon the fact that the defendant did in fact commit the crime he was induced to commit it is very important that you compare and analyze the issue of the alacrity with which a defendant joined the enterprise versus the extent of the inducement which was offered to him.

For example, I would suppose that if an undercover agent were to offer a million dollars if you would go over to the Woolworth and steal a transistor radio that most of us, I think, would agree that that was inducement to commit a crime. I don't think that we would be very well justified in assuming from the fact that you immediately agreed and went dashing across the street and came back with the radio and said "Here it is; where is the million dollars?" I don't think that that would go very far to prove predisposition because of the extreme amount of the inducement.

So that when you consider a situation in which, as in this case, there is little or no evidence of predisposition other than the fact that the defendant did indeed accept the money without too much argument, depending on how you evaluate the evidence, you have to consider that in the light of what the inducement was that was being offered.

I guess what I am trying to say is you can find predisposition from the fact that a defendant was ready and willing to commit the offense on this occasion; but in deciding whether he was ready and willing, you have to say: Would he have been ready and willing in the absence of the extensive inducement which was offered if you find that there was extensive inducement?

Now, I would caution you that so far as I recall — and it will be for you to recall — the only evidence that could arguably be considered as evidence of predisposition apart from the fact that the defendants did indeed accept money, did come to the place and accept the money, would be the statements by Criden made before getting in touch with either of them to the effect that they will take a hot stove or words to that effect.

I want to focus on that briefly. That evidence must be disregarded in its entirety unless you are convinced by the other evidence in the case that indeed the particular defendant whose case you are considering was a member of the conspiracy or joined the conspiracy at a later time with knowledge of its objects and so forth.

Assuming that you find that, the evidence can be considered because you find that indeed the defendant did join the conspiracy and, therefore, the statement of Criden, a co-conspirator, is properly considered as evidence against him as made in furtherance of the conspiracy. Then the question arises as to whether you can rely upon it as being accurate or true. You recall the arguments on that subject.

The argument is, as I understand it, from the defense is that the evidence establishes that at the time he made those statements Criden had never met Mr. Schwartz and not only that but when it was ultimately decided that Criden would attempt to set up a meeting with Mr. Schwartz he didn't even know him well enough to arange a meeting himself but, rather, involved intermediaries in arranging an introduction so that Criden could meet with Schwartz. And I take it the argument from the defense is that pretty much rules out any possibility that Criden knew what he was talking about when he talked about the hot stove.

Of course, you recall the other arguments relating to the credibility of Criden. Was he really saying something which he believed to be true, which he knew to be true, or was he simply trying to deceive the undercover agents into believing that he knew a lot more than he did know and that he was doing this as a form of salesmanship in aid of his own independent effort to obtain a $5,000 fee for arranging a meeting? These are matters for you to resolve.

The Government, I take it argues that there was no inducement and, therefore, you don't get to the question of predisposition. If you do get to the question of predisposition, the Government argues, as I understand it, that the defendants' readiness to accept the money on this occasion sufficiently establishes predisposition and that Criden's statements also bear on that issue. I leave all of those disputes for you to resolve.

I believe I have now come to the end of the legal issues and will try to summarize it so that you understand that you are, first of all, on the one hand, not here to decide generally whether you like what the Government did or not but, rather, the specific question as to whether what they did amounted to inducement and, if so, whether they have shown predisposition.

You are not here to decide in general whether the defendants took the money or whether they didn't but, rather, the extremely technical issues involved in the specific crimes charged here, which are federal crimes, and this Court can only consider federal crimes.

With that general warning, let me just briefly reiterate what the essential elements are. In order to convict under the second count, you have to be satisfied that the law firm of Criden, Johanson, Morrissey, Dolan and Cook was an enterprise whose activities affected interstate commerce, that Criden participated in the conduct of the affairs of the law firm through two or more acts of bribery in violation of state law, as I have defined that to you, that the defendant conspired with one or more other persons, and that an object of the conspiracy was that Criden would participate in the conducting of the affairs of the law firm through a pattern of bribery.

In order to convict under the third count, the Hobbs Act count, you would have to find beyond a reasonable doubt that the hotel project had it been genuine, would have involved interstate commerce and that the defendant conspired with one or more other persons to commit extortion — that is to say, obtaining money under color of office — and that the extortion would have affected interstate commerce had this hotel been a genuine project.

May I see counsel at Side-Bar, please?

(Side-Bar Conference as follows:)

THE COURT: Before we go into the question of the charge, I have been advised that the sister of Juror No. 11 has died.

What do you want me to do about that?

MR. SPRAGUE: Nothing at this time, Your Honor.

THE COURT: You don't want her told until after —

MR. SPRAGUE: That is correct.

(Pause.)

MR. FIORAVANTI: I suggest you substitute one of our alternates. We have two able-bodied alternates sitting there.

THE COURT: Here is my problem, and I want to invite counsel to address it. Obviously if the jury's deliberations are going to be relatively brief this is a minor item; but if the jury's deliberations are going to go on for an extended period then it later turned out in the interests of humanity we really should have excused Juror No. 11, I would feel rather bad about it. You see the problem?

MR. SPRAGUE: I see the problem, Your Honor.

THE COURT: We can't keep the alternate here as part of the deliberations.

MR. SPRAGUE: I know we can't, but I was interested in the attention I thought Juror No. 11 was paying certain aspects; and that is why I would object to her being excused.

THE COURT: Would you have any objection to my interviewing the juror and see if — you don't want her deliberating with this knowledge?

MR. SPRAGUE: I sure would not, judge. I think that is the risk we ought to take here at this stage of the case.

THE COURT: Well, I have heard from the two of you.

Anybody else have any position to state?

(Pause.)

MR. UNDERCOFLER: I would — I guess this is a cop-out — but I would submit it to the discretion of the Court to determine what is appropriate under humanitarian principles of providing. Certainly I could not agree at a later point to agree to an 11-person jury.

THE COURT: Obviously.

MR. SPRAGUE: Judge, I guess I will put it the other way. The same thing might have occurred 15 minutes from now.

THE COURT: It actually almost occurred at the beginning of the charge.

MR. SPRAGUE: My thought is it occurred at this stage while the Court was charging the jury, and she should not be excused.

THE COURT: I am not going to do it over defense objection.

Now, is everybody delighted with the charge?

MR. UNDERCOFLER: Will you hear from me first, Your Honor?

THE COURT? Yes.

MR. SPRAGUE: I will incorporate whatever he says.

MR. UNDERCOFLER: I will start from the back forward. You may want to have your law clerk pull this case.

THE COURT: No.

MR. UNDERCOFLER: But it is my understanding under Watson in entrapment that in the question of sufficient inducement is a question for the Court. And once the Court finds there is inducement, some evidence of inducement, the jury must be charged that they must decide predisposition and that they cannot — it is not a jury question whether or not there is sufficient inducement to consider.

THE COURT: Factual disputes as to what happened, I think that very clearly goes to the jury or at least it is an open question as to whether it has —

MR. UNDERCOFLER: That is my position.

THE COURT: I understand your position. I disagree with it for the moment.

MR. UNDERCOFLER: Do you want us to take an exception?

MR. SPRAGUE: I would take exception and ask the Court to charge the jury that the jury must find beyond a reasonable doubt that there was no entrapment.

MR. UNDERCOFLER: I think it is the Government's burden of proof.

THE COURT: I think I can clear up that inducement business.

MR. SPRAGUE: I am specifically asking the Court to make the charge as I understood it.

THE COURT: I understand.

MR. UNDERCOFLER: I except to the instruction on the predicate offenses as we have previously stated our position in our motion under Elliott. And I need not respond to it.

THE COURT: Yes.

MR. UNDERCOFLER: Secondly, I believe the Court has charged that they must conspire that Criden would participate in the affairs of the law firm through a pattern of racketeering.

THE COURT: That is what is charged in the indictment.

MR. UNDERCOFLER: I believe the indictment says they conspired to participate in the affairs — in other words, you must charge they intend to participate —

THE COURT: I understand the point.

MR. UNDERCOFLER: Okay. Third, I will take exception it is not necessary that the defendants need not know the precise nature of the enterprise.

THE COURT: Yes, precise identity.

MR. UNDERCOFLER: Precise identity. Thank you sir.

With regard to the Hobbs Act, I will take exception to the instruction on commerce. We would incorporate our previous motion on that.

THE COURT: Right.

MR. UNDERCOFLER: Similarly, in our previous motion on the definition of extortion. We would take exception to the definition of extortion under the Hobbs Act.

I would request that Your Honor clarify this point. You may have already done it, but I am a little concerned that it is their requirement that they find that they must make decisions whether or not there was a bribe here. I say that because in the earlier stage of Your Honor's charge you made the statement by receiving these bribes and then you said these payments. That was in the section where you were saying first you must look at what the defendants saw.

I don't want them to be confused they are not to consider bribery.

THE COURT: Except as a predicate offense.

MR. SPRAGUE: Except, Your Honor did inadvertently say by receiving these bribes —

THE COURT: I thought I corrected it.

MR. SPRAGUE: Quickly, but I am sure they did not think that was another word.

MR. UNDERCOFLER: On Your Honor's false exculpatory charge, I think you stated the principle of law holds that a false exculpatory statement is evidence. I think the proper instruction is it may be considered as evidence.

THE COURT: I think I wound up saying eventually it is up to them how they sorted it out. Okay.

MR. UNDERCOFLER: Finally, I would just request two other things. One, I am not sure whether you covered this or not, but I would like to bring to your attention they should be instructed that it is the burden of the Government to prove that the defendants were predisposed. It is not our burden.

THE COURT: Good heavens, I thought I made that clear but okay.

MR. UNDERCOFLER: Finally, I guess me too, I think when Your Honor was describing — commenting on the evidence about predisposition and statements by Criden you went through the evidence that Mr. Schwartz did not know Criden and Mr. Criden did not know Mr. Schwartz; but you did not mention the evidence submitted with regard to Mr. Jannotti.

THE COURT: I did elsewhere.

MR. UNDERCOFLER: Those are my points.

THE COURT: Mr Sprague is delighted, I believe.

MR. SPRAGUE: I join in what he said, Your Honor, with the addition that if You Honor is going to state anything further on the burden of the Government to prove beyond a reasonable doubt predisposition I would request the Court to word that where the jury finds there was entrapment and if the Government fails to prove beyond a reasonable doubt predisposition the jury must acquit.

THE COURT: Right.

MR. ROHN: Your Honor, we would object to that. I think that is covered. It is not we have to prove entrapment.

THE COURT: He slipped. He meant inducement really.

What else?

MS. HIGGINS: The only other point — I assume we have joined in everything Mr. Undercofler has said.

THE COURT: Your assumption is valid.

MS. HIGGINS: Was there an instruction on the admissibility of co-conspirators' statements and the requirement of the necessity of finding independent evidence of each defendent's participation in the conspiracy?

THE COURT: I said that.

MS. HIGGINS: And each co-conspirator's participation in the conspiracy prior the the admission of his statement as to each defendant?

THE COURT: Okay.

MS. HIGGINS: And that those statements were made in furtherance of the conspiracy?

THE COURT: I said that several times. I don't think I covered the co-conspirator.

What else?

MR. UNDERCOFLER: I would join in it.

MR. ROHN: Your Honor, the immunity charge—

THE COURT: How true.

MR. ROHN: — since Cook was an immunized witness.

MR. SPRAGUE: Judge, one last afterthought, just thinking through your charge. I don't think you said anything about the indictment not being evidence.

THE COURT: I will be glad to.

MR. SPRAGUE: I guess you had better say something about that.

MR. UNDERCOFLER: I will put on the record, first of all, I join with Mr. Sprague; but, secondly, Your Honor I think — this may not be the time — we have to address the form of the indictment before it goes out.

THE COURT: Sure. Do you have anything else from the Government?

MR. ROHN: No, sir.

THE COURT: Okay. Thank you.

(Side-Bar Conference concluded.)

THE COURT: Members of the jury, those of you who have good memories may recall in the course of your voir dire I told you that you would be instructed on the question of immunized witnesses, and it has been brought to my attention that I have failed to live up to that statement.

I neglected to point out in the course of the charge that where a witness testifies under grant of immunity that gives rise to special circumstances relating to the reliability of the testimony; and, therefore, the testimony of any such witness should be very carefully considered before being accepted as correct.

A witness testifies under a grant of immunity when the witness has been assured that his testimony will not be used against him in any criminal proceeding or when he has been assured that he will not be prosecuted.

The witness, Ellis Cook, testified here under a grant of immunity; and you should carefully consider the special circumstances in evaluating his testimony and you should not accept it as correct unless you have carefully scrutinized it and are satisfied that it is indeed correct.

In telling you that before you can consider the out-of-Court statements by a co-conspirator you must be convinced by other independent evidence that the defendant whose case you are considering was a participant in the conspiracy.

I neglected to point out, and I am not glad to do so, of course, you must also be satisfied that the co-conspirator who is making the out-of-Court statement was also a participant in the conspiracy. In short, you must find from independent evidence — that is, evidence independent of the statement you are considering that it was a co-conspirator's statement — the person making the statement was a co-conspirator with the defendant whose case you are considering.

I may have been guilty of a slip of the tongue. I know I was in one instance. I thought I corrected it where I was talking about receipt of the bribes by the defendants. I did not mean to prejudge that issue. Receipt of the payment by the defendants and whether that was or was not a bribe is up to you to resolve in accordance with the instructions that I gave you at great length.

I also may have inadvertently said that evidence of a false exculpatory statement — that is, a false denial of involvement — that that is evidence; and I should have said and intended to say that it may be evidence of guilt. It depends on how you evaluate it as I have discussed with you earlier. Of course, it is in the case of Defendant Jannotti and not in the case of Defendant Schwartz.

The indictment is simply a written statement of the charges. The indictment does not constitute evidence. If you find from the evidence that there was inducement, that the crime was induced by the Government agents — that is, if you accept as correct the inferences urged upon you by defense counsel to the effect that Criden was being paid money to bring them in and that they were being offered this hotel project only on condition that they accept and so forth, if there was inducement — if you find those facts to be correct, then that would amount to inducement and you would therefore acquit the defendants unless the evidence as a whole satisfies you beyond a reasonable doubt that they were predisposed.

In short, the burden is upon the Government in a case of this kind to prove beyond a reasonable doubt that there was no entrapment. If the defendants were induced to commit the crime, then they were entrapped and should be acquitted unless the Government satisfies you beyond a reasonable doubt that they were predisposed to commit the crime. And when I say "they," I, of course, mean each defendant whose case you are considering.

Is that satisfactory?

(No response.)

THE COURT: All right, members of the jury, as I said, this is a very important case and I know it will receive your very careful consideration. I now commit it for your consideration.

The two alternatives are now excused with the thanks of the Court. I hope you get a chance to vote the next time you get on the jury.

I would caution the alternates, please do not discuss the case with anyone until after the jury has rendered its verdict. You understand that. All right.

(The two alternate jurors were excused.)

THE COURT: I take it — should we have a separate oath? I guess we should at this point. You are already under oath?

THE DEPUTY MARSHAL: Yes, Your Honor.

THE COURT: The jury is in the custody of the marshal. Follow that man.

(Pause.)

MR. SPRAGUE: Your Honor, may we see you one second?

THE COURT: I am inclined to believe the estimate of my length of the charge was somewhat unrealistic.

(Side-Bar Conference as follows:)

MR. SPRAGUE: Judge, from past experience, without meaning to deflate the U. S. Marshals, they talk an awful lot.

Will you make sure in this case the marshals are specifically told not to bring anything to the attention of that juror?

THE COURT: They are expressly instructed not to tell Juror No. 11 her sister died.

MR. SPRAGUE: They do talk around here. I would hate to have anything like that get to her.

THE COURT: I will make sure.

MR. SPRAGUE: You are going to have them start deliberating now?

THE COURT: A question when the marshal made dinner arrangements for them.

> MR. UNDERCOFLER: I would suggest that the indictment be edited as follows: That Paragraphs 1 and 2 of Count 1 be left on it and the rest of it be whited out and only Counts 2 and 3 go out with the jury.
>
> MR. FIORAVANTI: The object of the conspiracy is to violate the substantive count. It has to describe Criden's activities. We would ask the last three counts be knocked off.
>
> THE COURT: I hate to deflate anybody. It is not my practice not to send it out unless somebody asks for it.
>
> MR. UNDERCOFLER: Fine.

THE COURT: If they ask for it. The very well may.

MR. FIORAVANTI: Our request would be it go out, that it does go out.

THE COURT: Well, let me look it over.

MR. FIORAVANTI: Of course, with the omission of the last three counts which Your Honor has already dismissed.

MR. SPRAGUE: Our request — I think your practice is a good practice, judge.

MR. UNDERCOFLER: My concern, Your Honor, is that first count is so confusing unless you are really a smart lawyer under the RICO statute you don't know who the defendant is.

MR. SPRAGUE: Judge, I would join. If you end up at some point thinking of any point of that indictment going out, it seems to me the only part of Count 1 that is permitted to go out is that which is incorporated in Count 2 and 3, which is the first two sections of Count 1. You cannot have the others that are not even incorporated in the indictment go out.

THE COURT: What did you incorporate in Count 2?

MR. FIORAVANTI: The paragraphs identifying parties.

MR. SPRAGUE: One and two.

THE COURT: One and two.

Is there any other cross reference to the first count?

MR. FIORAVANTI: No, I don't believe.

MR. ROHN: Not specifically incorporated, only Count 2. The object of the conspiracy is contained in Count 1.

MR. SPRAGUE: I want it clear I am requesting it not go out at all, any go out.

THE COURT: I will tell you what I am going to do. I am going to look it over in chambers and decide whether there is anything in there which should go out; and, in short, I am going to defer ruling for a brief period while I look it over.

MR. SPRAGUE: Whatever you rule —

THE COURT: You will be consulted.

MR. SPRAGUE: We will be here.

Judge, my practice here is to remain in the courthouse unless and until the jury goes out to eat or they go home for the night. So I will be right here.

THE COURT: Stick around for a few more minutes.

(Recess at 5:55 o'clock P.M.)

(6:05 o'clock P.M. with Mr. Sprague present only.)

THE COURT: Put this on the record.

It is my feeling in view of the Government's request that the indictment can go out with the jury but it should include only the first three counts and not the ones that have been dismissed. And I will assume for purposes of the record that the defendants all object to that.

MR. SPRAGUE: That is correct.

THE COURT: Steve, when you get Mr. Fioravanti, tell him we are sending out the indictment but only the first three counts but not the rest.

MR. SPRAGUE: The second part of the request in the event you send it out, that on the first count you white out from Paragraph 2 — after Paragraph 2.

THE COURT: I know, but that is what I am disagreeing with. That is what you are objecting to. Okay.

(Recess at 9:07 o'clock P.M.)

(In Chambers at 9:50 o'clock P.M.)

THE COURT: I have the following note: "Do all defendants have to know of every part of the conspiracy before we can convict him of participating in it?

"Restate his charge on that issue."

(Pause.)

THE COURT: I hear a lengthy silence. What do you want me to say?

MR. SPRAGUE: Well, it is a complex kind of answer, Judge, because it gets into a number of different facets.

THE COURT: Yes.

MR. SPRAGUE: It has to do with what is the determinant for deciding whether someone is in a conspiracy or other conspiracy and what is involved in determining what is the conspiracy before you can then get to that answer.

THE COURT: Fair enough. Well, suppose I have a try at restating the charge on that issue. Bring the jury in. I will give counsel a chance to complain about what I say after I say it, if there are any changes in it.

MS. HIGGINS: Would you read the question one more time?

THE COURT: It started out by saying does, it looks as if they crossed off the last two letters: "Do all defendants have to know of every part of the conspiracy before we can convict him of participating in it?

"Restate his charge on that issue."

MR. SPRAGUE: Well, I take it now they are not talking about who are the participants but they are talking about the purpose of the conspiracy and it would seem to me that with regard to that, yes, they have to know the entire purpose of the conspiracy.

THE COURT: Well, certainly that part of it is correct.

Okay, let's have a go at it and hear further from counsel after I charge them.

(Conference In Chambers concluded at 9:52 o'clock P.M.)

(In Open Court at 9:53 o'clock P.M.)

THE COURT: Members of the jury, I will note for the record that you have sent a question in. I will read it for the record and then try to respond to it.

The question reads: "Do all defendants have to know of every part of the conspiracy before we can convict him of participating in it?"

And you ask that I restate my charge on that issue.

That seems like a very simple question but it gets rather complicated and let's see if I can straighten it out for you. Bear in mind there are two different kinds of conspiracies charged in this indictment. The second count charges a conspiracy to commit a violation of the racketeering act and the third count charges a conspiracy to violate the Hobbs Act, a conspiracy to obstruct interstate commerce through extortion.

Now, let's start with the third charge first, the Hobbs Act conspiracy charge. Obviously you consider each defendant's case separately. Before you can convict a defendant of the offense charged in the third count, the conspiracy to obstruct interstate commerce through extortion, you have to find beyond a reasonable doubt that the defendant knew as follows: That he knew that the object of the conspiracy was to perform acts which would have — perform acts which objectively would have had an effect on interstate commerce. In other words, to be specific the defendant would have to know that it was a purpose of the conspiracy to receive payments in the nature of bribes, that is to say extortion, from the hotel enterprise.

And he would have to know at least one other person was involved and that he was working jointly with somebody else on this. In shot, he has to know that there is another participant in the conspiracy and he would have to know the object of the conspiracy.

So that before a defendant could be convicted under the third count he would have to know, of course, that he had an agreement or understanding with at least one other person and he would have to know that the purpose of that agreement or combination or understanding was that the plan was to receive payments in the nature of bribes which would constitute extortion from a hotel enterprise.

It would not be necessary for the defendant to be consciously aware that it would have an effect on interstate commerce so long as he was aware of the nature of the act which he was committing, namely the agreement to receive a bribe from a hotel-type enterprise.

But it would not be necessary for him to know all of the participants as long as he was conscious that he himself was a part of an agreement between two or more people and that it was the object of that agreement that bribes would be paid and received in circumstances which in your judgment would make it reasonable to suppose that it would be an obstruction of interstate commerce. As long as he knows that much he would not have to know exactly the identity of every other person who might be involved. He would not have to know of every instance on which bribes were to be paid or received but he would have to know at least enough to know that the object of the conspiracy was that bribes would be paid and received and be a knowing and intentional participant in that arrangement.

With respect to the conspiracy charged in the second count, the racketeering act of conspiracy or the RICO conspiracy, it is more complicated. In order to be convicted under that charge a defendant would have to know that there was a scheme to commit a series of acts, at least two acts, of bribery under state law and that an object of the agreement between the defendant and one or more other persons was that Howard Criden would be assisting in carrying out the affairs of an enterprise through a pattern of such bribes, that is to say through a series of at least two or more bribe transactions.

It would not be necessary that he know specifically the identity of the law firm or the exact ramifications of the enterprise so long as he knew there was an enterprise and that an object of the conspiracy was to participate in the conduct of the affairs of that enterprise through a pattern of racketeering activity.

It would not be necessary in order to sustain a conviction under that count that the defendant know the identities of all of the other persons who might be involved in it. But it must be shown at the very least that the defendant knew that he was participating in a conspiracy, that he was participating in an agreement between at least two people and that an object of that agreement was that Criden would be conducting or participating in the conducting of the affairs of an enterprise through a pattern of racketeering activity, namely through at least two instances of bribes.

Does that answer your question?

(The jury answered in the affirmative.)

THE COURT: Do counsel want ot get anything on the record?

MR. SPRAGUE: Yes, Your Honor.

THE COURT: At Side-Bar.

(Side-Bar Conference as follows:)

THE COURT: Any problems?

MR. UNDERCOFLER: Well, my first thought is, Your Honor, there is a single conspiracy charged here. One could find, I think, from Your Honor's explanation it is possible to have more than one conspiracy. I think Your Honor's charge should be the hub-wheel conspiracy, there has to be reason to believe there are others involved.

MR. SPRAGUE: In addition, Your Honor, I think the question was not about other participants although you in your response gave that. They talked about parts of the conspiracy.

I would take it that the law is that in order to be a conspirator — the answer to the question is yes, Your Honor, a conspirator has to get into the conspiracy, know all parts of the conspiracy and that is what they asked you. That is not what you answered.

THE COURT: Well, I understand your position. I think I will let it stand the way it is.

Anything from the Government?

MR. FIORAVANTI: I think it is fine the way you said it.

THE COURT: Your position is on the record.

MR. UNDERCOFLER: We state our other positions in response to —

THE COURT: You don't have to, you are already on record.

(Side-Bar Conference concluded.)

THE COURT: I will amplify what I said just in case I misunderstood your question.

But counsel have pointed out to me and I want to remind you, depending upon how you evaluated the evidence, it could be found and I take it at least some of the defense argument is to the effect the evidence can be interpreted as showing that there was not a conspiracy or a single conspiracy which the defendants are accused of being involved in but that what Criden was doing in his dealings with the undercover agents was Criden's own conspiracy, that he was conspiring with the agents. The object of that conspiracy was that Cirden would be paid for suggesting names and bringing people to meeting them and that that is separate and apart from the question of whether the defendants did — in short, I am not changing the instruction I gave you but I want to point out to you that if you conclude that Criden was involved in a conspiracy for the purpose of lining his own pocket by bringing in people to meet the sheiks, that that would not necessarily be consistent with the defendants being involved in that same conspiracy.

So that I am going to reiterate what I said before and just to make it clear, and I hope I am not confusing you too much, you have to be satisfied that the particular defendant whose case you are evaluating was a knowing participant in an agreement between himself and at least one other person and he must know the object of that agreement, what their illegal purpose was.

He must know in the Hobbs Act case that it was an object of the conspiracy that their intent was to so solicit or receive bribes which would amount to extortion and impede interstate commerce.

And in connection with the RICO charge, the conspiracy charge in the second count, he must know that it was an object of the conspiracy that it was their intent, the intent of the conspirators that the affairs of an enterprise would be participated in by Howard Criden through a pattern of two or more bribes.

If you are satisfied of those elements beyond a reasonable doubt then you could appropriately convict the defendant regardless of whether there is proof that he knew all aspects of the conspiracy or all the participants.

Do you understand that?

(The jury answered in the affirmative.)

THE COURT: Okay, good luck. Incidentally, while you are here I want to make it clear your choice as to whether to continue this evening or recess until tomorrow is entirely up to you and we are not pressuring you one way or the other. I just don't want you to think you are to work late at night. You have had a long day; and if you get too tired and want to quit, don't hesitate to say so.

All right, take the jury out.

(Jury out.)

THE COURT: I will assume that counsel for both sides object to the additional instructions?

MR. SPRAGUE: That is correct, Your Honor.

THE COURT: Recess until we get some word.

(Recess at 10:05 o'clock P.M. until 10:23 o'clock P.M.)

THE COURT: You may take the verdict.

THE DEPUTY CLERK: Members of the jury, have you reached a verdict?

JUROR NO. 1: Yes, we have.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment V:

> No person shall . . . be deprived of life, liberty, or property without due process of law; . . .

United States Code, Title 18:

§1951. Interference with commerce by threats or violence (the "Hobbs Act")

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—

* * *

> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

§1962. Prohibited activities (Racketeer Influenced and Corrupt Organizations Act: "RICO")

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any peson to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

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Nos. 83-1891 and 83-1892

In the Supreme Court of the United States

OCTOBER TERM, 1984

HARRY P. JANNOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE X. SCHWARTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were entrapped as a matter of law.

2. Whether the Due Process Clause requires that petitioners' convictions be reversed because the government's conduct of the investigation was improper.

3. Whether petitioners' convictions should be set aside because the trial court did not specifically instruct the jury that it was to find that the government induced petitioners to commit the offenses unless the government disproved that fact beyond a reasonable doubt, when the trial court did instruct the jury that the government was required both to prove predisposition and to disprove entrapment beyond a reasonable doubt.

4. Whether petitioners' convictions for conspiracy to commit extortion that interferes with interstate commerce, in violation of the Hobbs Act (18 U.S.C. 1951), must be reversed because the illicit payments were received from undercover FBI agents in connection with a fictitious scheme and therefore could not actually have affected interstate commerce.

5. Whether petitioners' Hobbs Act convictions should be set aside on the ground that petitioners did not induce or demand the payments made to them.

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioners' convictions (Pet. App. 1-39) is reported at 729 F.2d 213. An earlier opinion of the court of appeals (Pet. App. 47-151), reversing the district court's order entering post-trial judgments of acquittal, is reported at 673 F.2d 578. The post-trial opinion of the district court (Pet. App. 175-223) is reported at 501 F. Supp. 1182. The district court's pretrial opinion dismissing certain counts of the indictment (Pet. App. 153-172) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1984. A petition for rehearing was denied on March 20, 1984. The petitions for a writ of certiorari were filed on May 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, each petitioner was convicted on one count of conspiracy to obstruct interstate commerce, in violation of the Hobbs Act, 18 U.S.C. 1951(a). Petitioner Schwartz was also convicted on one count of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. 1962(d)). Petitioner Jannotti was sentenced to a six month term of imprisonment and fined $2,000, and petitioner Schwartz was sentenced to a one year term of imprisonment and fined $10,000.

1. Petitioners' offenses arose out of the FBI operation known as Abscam. That operation involved undercover agents who posed as representatives of a wealthy Arab sheik who was seeking to invest money in the United States and to emigrate here. The Abscam operation led first to Angelo Errichetti, the mayor of Camden, New Jersey, who was subsequently convicted of numerous charges arising out of the investigation. See *United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). Errichetti introduced the agents to Howard Criden, a lawyer from Philadelphia. At one point in his dealings with the agents, Criden told them that, for a fee, he could arrange introductions to various congressmen who would help the sheik remain in America after he emigrated. The agents assented. Four congressmen were subsequently indicted and convicted for agreeing to sponsor private asylum legislation on behalf of the sheik in exchange for cash payments. See *United States* v. *Myers*, *supra*.

One of those congressmen, Representative Myers of Philadelphia, suggested that if the sheik invested in a project in his district it would provide a credible explanation for any future assistance to the sheik. FBI informant Weinberg, following Myers's suggestion, contacted Criden, told him that the sheik was "looking to build a hotel" in Philadelphia, and suggested that Criden arrange meetings with congressmen regarding the hotel project. Pet. App. 51-52; Tr. 2384A.[1] Criden responded that Weinberg should find out the specifics of the project so that Criden could direct them to officials who could "give you more help" in connection with such a project than a congressman would (Pet. App. 52). Criden boasted that he knew "Everybody!" in Philadelphia and said: "Remember, I got a [law] partner who's a city councilman" (*ibid.*).

A week later, FBI undercover agents Wald and Haridopolos, posing as representatives of the sheik, met with Criden in the agents' hotel room. Their conversation was videotaped. Criden assured them that they could deal candidly with his law partner, city councilman Louis C. Johanson, and that the "tariff" for Johanson's help would be $25,000. Pet. App. 52-54. Criden also told the agents that petitioner Schwartz, the City Council President, was a powerful figure in city government, and that the agents could also "deal" with Schwartz, although "[h]e may want to handle it indirectly" (*id.* at 53). Criden said the "tariff" for Schwartz would be $50,000. The agents balked at this figure and suggested $30,000; Criden agreed to "run it up the flagpole." Criden asked for a fee of $10,000 for delivering both city councilmen. *Id.* at 54.

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[1] This citation to the transcript is derived from the briefs filed by the government in the court of appeals.

Several hours later, Criden returned to the hotel room with Johanson. Johanson assured the agents that the hotel project would be able to avoid any conflict with city licensing and inspecting authorities. Specifically, he said that the authorities are "not gonna monkey with you for a minute because they're gonna be told not to" (Pet. App. 54). Johanson went on to state that he, Schwartz, and petitioner Jannotti "run the City Council." The following conversation about Jannotti then occurred (Pet. App. 55):

> WALD: Would he be interested in doing business with us.
>
> JOHANSON: I don't know that it's necessary but if you want to we can.
>
> WALD: I don't know — if it is — you're the best judge of that.
>
> JOHANSON: I think George [Schwartz] is ah —
>
> CRIDEN: Well, it might not be a bad idea to bring Harry [Jannotti] up.
>
> JOHANSON: We can bring Harry up. Harry's the Majority Leader. He's the — ya know, second in command.
>
> WALD: Yea.
>
> JOHANSON: He's got seniority.

Johanson was given a $25,000 payment. The following exchanges occurred in connection with this payment (Pet. 55):

> HARIDOPOLOS: Are you acquainted with how much ah, ya know, ah for the favor and for all these assur — assurances, right.
>
> CRIDEN: Right.
>
> HARIDOPOLOS: You know how much it is?

JOHANSON: Sure.

HARIDOPOLOS: How much is it?

JOHANSON: Twenty-five.

HARIDOPOLOS: Okay, ah but, of course, ah, we have to have these proper assurances. You do us a favor, we're doin' you a favor.

CRIDEN: Obviously.

JOHANSON: Sure.

* * * * *

WALD: And for 25 we've got a friend.

JOHANSON: Right.

Three days later Criden brought Schwartz to meet with the sheik's representatives.[2] This meeting was also videotaped. Criden stated that he had discussed the hotel project "at length" with Schwartz. Undercover agent Wald said that he was concerned about "problems such as * * * zoning and variances and this type of thing" and that his mission was to "take care of any potential problems long before they exist" (Pet. App. 58). As the court of appeals put it, "Schwartz responded to this overture with a soliloquy on his own political power and importance" (*ibid.*). The following exchange, quoted by the court of appeals, then occurred (*id.* at 58-59):

> SCHWARTZ: * * * I have been close to every chairman [of the Democratic National Committee] * * *. I am a member of the Democratic National

---

[2] Criden was introduced to Schwartz by a mutual friend, a municipal judge, who told Schwartz that Criden represented investors who wanted Schwartz's "advice" and would be willing to pay for it (Pet. App. 56). There was evidence that the judge received $3,000 in cash from Criden for his services (Pet. App. 57 n.5).

Committee. I am a member of the State Committee. I am a member of the City Committee. A Ward Leader. I, uh, I have a ward — if you know what that means in politics.

* * * * *

WALD: Is it fair to say that by doing business with you, uh . . . my zoning problems become . . .

SCHWARTZ: Right.

CRIDEN: You, you don't have any.

WALD: Okay. Now. There are what, 17 members, as, as you say . . . and also what uh I read here . . .

SCHWARTZ: Right.

WALD: Uh, do we have a uh controlling vote . . .

SCHWARTZ: Yes.

WALD: . . . problem here?

SCHWARTZ: No . . .

WALD: Uh.

SCHWARTZ: No.

WALD: Can you control . . .

WALD: . . . those types of factions?

SCHWARTZ: Yes.

WALD: You can control them? . . .

SCHWARTZ: The proof was today. The proof was the election of myself as president again.

WALD: Uh hmm.

SCHWARTZ: In other words, we got uh five or six n[e]w members that came in. Uh, you tell me your birth date. I'll give them to you for your birthday.

* * * * *

WALD: All right. You're controlling the council at this point.

SCHWARTZ: Right.

WALD: As far as I'm concerned.

SCHWARTZ: Right.

CRIDEN: Right. And has been for . . .

SCHWARTZ: Right. Right.

WALD: Should we have anything that comes up to a vote, that has to be done on a vote basis, the council is with you.

SCHWARTZ: Yes.

WALD: You control them at this point.

SCHWARTZ: Yes. Yes. Yes.

CRIDEN: 100 percent.

SCHWARTZ: Yes.

Schwartz subsequently explained that his ability to control the city government extended beyond the council (Pet. App. 60-61):

> SCHWARTZ: There is a Board of Building Standards. There, there is built-in relief every stage of the way. There's a Zoning Board of Adjustment for variances.
>
> WALD: Okay. Can you control that?
>
> SCHWARTZ: Yes . . .

* * * * *

WALD: Okay. Meaning that, if City Council has to vote on it, we don't have a problem at this point?

SCHWARTZ: Well, I'm going further. There are other boards and agencies, uh, depending upon what your client, how idiosyncrant [*sic*] he wants to be and how eccentric he wants to be.

WALD: (Laughter) . . . They can become rather eccentric.

SCHWARTZ: All right. All right. It may be necessary to go to these various boards and commissions. Now, they are part of the organization. They are part and parcel and . . .

WALD: Appointed, appointed officials?

SCHWARTZ: Yes, they are appointed officials. Uh, but uh, as I say, uh, I always do my homework. And, uh, the mayor is a very strong mayor. We have a strong mayor form of government. And all these people are his appointees. My understanding with him is that I go to him — period. I don't even have to go to one of the flunkies, one of the functionaries. I go to him . . . [3]

The discussion subsequently turned to Schwartz's payment, as follows (Pet. App. 61-63):

WALD: * * * We've talked to Howard [Criden], you know, the figures, the dollars we're talking about are in the right ballpark. We're . . .

SCHWARTZ: That's not my prime concern. I'm interested in the City of Philadelphia. I'm interested in a good project. I'm interested in tax rateables. I want to see Center City develop. Especially Center City. There are a few parcels left. Well anything else that's going to add to the tax rateables of the city that's going to create jobs.

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[3] The Abscam operation disclosed no reason whatever to believe that Mayor Green of Philadelphia was corrupt; the contrary is true. See page 11, *infra*.

WALD: I am again quick to say that I'm not really interested in the City of Philadelphia to be candid.

SCHWARTZ: Well I have to be. I have to be.

WALD: Perhaps, oh sure . . . (inaudible)

CRIDEN: Your primary concern is to see that if your employer decides to move, you have a minimum amount of problems.

WALD: Exactly . . . Problems are to be handled before they arise. Right. Should any minor problems come up. Should any problems that are councilmatic in scope. . .

SCHWARTZ: No problem.

WALD: You could take care of them. Those are the type of things . . .

SCHWARTZ: Right.

WALD: That he asks I make an unequivocal, yes, it's been handled, it's been taken care of and uh . . .

CRIDEN: You make that an unequivocable yes.

SCHWARTZ: It's . . . I would say to you that it's much easier now than it is than it was four years ago.

* * * * *

SCHWARTZ: There are administrative escape hatches for everything in the City of Philadelphia under our various codes. There's a way of doing it —administrative way of doing it.

WALD: Okay, and that is the type of thing you can handle for us.

SCHWARTZ: Oh yeah, right.

WALD: I can go back and say I met a gentleman. We had a business deal uh. I've made a friend in Philadelphia.

SCHWARTZ: Yes.

WALD: And things are taken care of . . .

SCHWARTZ: Right . . .

WALD: Okay, and the sums appropriate and we're in good shape. Okay.

Shortly thereafter, Wald handed Schwartz an envelope containing $30,000 in cash, the payment previously agreed upon with Criden. Schwartz accepted the envelope. He then reaffirmed his commitment (Pet. App. 63):

WALD: The legislative problems we've taken care of ?

CRIDEN: No problem.

WALD: Okay, that I can, that I, that I got assurance on.

SCHWARTZ: Right.

CRIDEN: You have, you have no problem.

WALD: Okay, the other things can be done through attorneys, but the legislative problems don't exist anymore?

CRIDEN: That's right.

SCHWARTZ: No. Do not.

WALD: Okay.

Criden remained behind after the meeting, and Wald expressed an interest in meeting petitioner Jannotti. Criden said he would approach Jannotti but said to Wald, "if the answer is no, I'm going to tell you right off the bat, forget it" (Pet. App. 63). Wald asked if there was anyone else with whom he should try to do business, and Criden told him there was not (*id.* at 64). Notably, notwithstanding Schwartz's boasting about his relationship to Mayor Green of Philadelphia, Criden told the agents that the mayor was "an All American boy" and that it would be "a critical mistake" to approach him (*id.* at 58).

Criden brought petitioner Jannotti to the agents the following evening. This meeting was also videotaped. In response to Wald's allusions to the payment Jannotti was about to receive, Jannotti, echoing Schwartz, emphasized that he would assist the sheik's project because it was "legitimate" and would aid Philadelphia. But when agent Haridopolos said: "A lot of legitimate, ah, things get bogged down, we don't want to be bogged down" (Pet. App. 66), Jannotti replied (*ibid.*): "No, I can't see this being bogged down."

Shortly before Jannotti was handed cash, Wald said: "Did he [Criden], was he very graphic with ya?" and Jannotti replied "Yes." Wald said: On exactly how . . ."; Jannotti nodded and said: "He was always up front, up front" (Pet. App. 67). Immediately before Jannotti was paid, the following exchange occurred (*id.* at 68-69):

> WALD: Can I go back, ah ah, to my employer, the Sheik and tell him that I dealt with a man, on Wednesday night tell him who he is, dealt with you, Thursday night, explain who you were, what your position is and say he and I conducted a cash business transaction and he guaranteed me, we don't have a problem in Philadelphia. We ah, ah City Councils on our side the man has the influence with the Finance Committee, he has influence . . .

JANNOTTI: You wouldn't, you wouldn't be able to say we don't have a problem. Problems might arise, but problems ah, you might say problems can be solved.

WALD: Ok, you can handle those problems we presume.

JANNOTTI: I don't see why not if its a legitimate, if it's a if it's a legitimate if it's a, if it's a legitimate enterprise, it's a legitimate piece of business.

WALD: By making friends with you this evening, if we have to go to City Council and say look, ya know, give us a break, right, got us some legislation that this is ok. That its in the right neighborhood, that the time.

CRIDEN: If you want a street for example let's say changed from a two way to a one way ok, maybe that will help you.

WALD: Ok.

CRIDEN: Handle your traffic pattern.

JANNOTTI: We handle that everyday.

WALD: But I go back and I'll say we have this, and I'll use that as an example that if we have a one way street situation and it's just hurting the front, of, of the place we cannot move people in and out of the hotel limousines to private vehicles and what have you, ah the men I dealt with said they will help. I'm not saying that you could walk in there and change this thing tomorrow, but.

CRIDEN: Yet.

JANNOTTI: We'll go in there and battle, we'll go in and battle.

WALD: You're with us?

JANNOTTI: Certainly, we'll go in and battle.

Wald then handed Jannotti an envelope containing $10,000 in cash and asked if "that amount is sufficient." Jannotti took the envelope and said "We've discussed it" (Pet. App. 69). The following exchange then occurred (*ibid.*):

> HARIDOPOLIS: You know how much it is?
>
> CRIDEN: Tell him, you can tell him.
>
> HARIDOPOLIS: How much is it?
>
> CRIDEN: Tell him?
>
> JANNOTTI: We won't even discuss it.
>
> WALD: Ok, but you did discuss it with Howard?
>
> JANNOTTI: We won't even discuss it.
>
> HARIDOPOLIS: Is this arrangement please, pleasing to you?
>
> JANNOTTI: As I say, we won't even discuss it.
>
> WALD: Ok, well, we've done our business.

2. Petitioners were indicted with Johanson and Criden. The prosecutions of the latter two were dropped after they were convicted in the United States District Court for the Eastern District of New York on charges growing out of another aspect of the Abscam operation. Petitioners were convicted by a jury, but the district court entered a judgment of acquittal on all counts and dismissed the Hobbs Act charge (Pet. App. 175-223). The district court's decision rested on four grounds: that the government had not demonstrated a sufficient connection between petitioners' activities and interstate commerce to support the Hobbs Act convictions (*id.* at 175-179); that the evidence established entrapment as a matter of law (*id.* at 183-218); that the government's conduct of the investigation was "so outrageous as to amount to a violation of due process" (*id.* at 218;

see *id.* at 218-222); and that federal jurisdiction over the offenses was "artificially created" by the government (*id.* at 223; see *id.* at 221-222). The district court remarked, however, that "[n]o-one who has viewed the videotape evidence in this case could avoid feelings of distress and disgust at the crass behavior the tapes reveal. The jury's verdict represents a natural human reaction to that evidence" (Pet. App. 223).

The court of appeals, hearing the case en banc, reversed the district court's order in a comprehensive opinion on which we rely (Pet. App. 47-116).[4] This Court denied certiorari. 457 U.S. 1106 (1982). After petitioners were sentenced, they again appealed, and the court of appeals affirmed (Pet. App. 1-39).

ARGUMENT

1. Petitioners contend (83-1891 Pet. 25-27; 83-1892 Pet. 21-23) that they were entrapped as a matter of law because the evidence was insufficient to establish their predisposition to accept the illicit payments. This contention is insubstantial.

We note first that the Abscam operation did not target petitioners at random or for an arbitrary purpose; Criden, petitioners' co-conspirator, brought petitioners to the undercover agents' attention. Criden had a demonstrated capacity for delivering corrupt public officials; before he brought petitioners to meet the agents he delivered Johanson, whose corruption was manifest. In addition, the agents had reason to believe that Criden did not make reckless claims about who was susceptible to corruption; he cautioned the sheik's representatives in strong terms against approaching Mayor Green and other members of the city council. As the court of appeals noted (Pet. App. 92), "the statements of Criden and Johanson indicating that [petitioners] would be ready and willing to accept payments in return for political favors and that they had done so in the past * * * support the jury's determination that [petitioners] were predisposed."

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[4] Judges Aldisert and Weis dissented, essentially for the reasons stated by the district court (Pet. App. 117-151).

As the court of appeals also noted, however (Pet. App. 92), petitioners' own videotaped statements and actions reveal ample evidence of their predisposition to accept payments in return for political favors. The evidence permitted the jury to find that petitioners attended a meeting at which they knew, from Criden, that they would be given bribes. Agent Wald made it clear at the outset of both meetings that he was seeking "assurances" and political favors. Petitioner Schwartz boasted at length in an effort to impress the persons whom he believed were willing to make a large payment to him; indeed, he promised to "give" Wald the votes of city council members "for your birthday." Petitioner Jannotti agreed with Wald's characterization of their relationship as a "cash business transaction" that would "guarantee[] . . . that we don't have a problem in Philadelphia" (Pet. App. 92-93).

At the end of the meetings, petitioners unflinchingly accepted large payments — in cash — that could have had no conceivable honest purpose. While the agreements between petitioners and the agents were arrived at only after a degree of circumlocution and oblique references to the fact that cash was being exchanged for political influence — a manner of discourse that is hardly surprising in view of the blatantly illegal nature of the transaction — the agents did not engage in anything remotely resembling the relentless, badgering, high-pressure tactics that this Court has held to constitute entrapment as a matter of law. See *Sherman* v. *United States*, 356 U.S. 369, 373-374 (1958).

In fact, as the court of appeals noted, petitioners can "point to no statements or gestures which indicate any reluctance whatsoever to accept the proffered payments"

(Pet. App. 102). Petitioners did not attempt to report the incident or turn the money over to the city government. The jury viewed the meetings on videotape and had an opportunity to study "the actions, words, voice inflections and mannerisms of the defendants and the F.B.I. agents" (*id.* at 103). The jury was then carefully instructed that "in order to find predisposition based merely upon the fact that the defendant did in fact commit the crime * * * it is very important that you compare and analyze the * * * alacrity with which the defendant joined the enterprise versus the extent of the inducement which was offered to him" (*ibid*). The jury's conclusion that the source of petitioners' willingness to accept corrupt payments was their own predisposition, and not government pressure, was plainly reasonable and does not merit review by this Court.

2. Petitioners also assert that even if they were predisposed, the government's conduct of the investigation was so outrageous that the Due Process Clause requires that their convictions be reversed (83-1891 Pet. 18-22; 83-1892 Pet. 9-14). This argument has been advanced by other defendants whose convictions resulted from similar aspects of the Abscam investigation; it has been uniformly rejected by the courts of appeals, and this Court has denied review. See, *e.g., United States* v. *Silvestri*, 719 F.2d 577, 581 (2d Cir. 1983); *United States* v. *Weisz*, 718 F.2d 413, 440-441 (D.C. Cir. 1983), cert. denied, No. 83-1036 (Feb. 21, 1984); *United States* v. *Kelly*, 707 F.2d 1460 (D.C. Cir.), cert. denied, No. 83-308 (Oct. 11, 1983); *United States* v. *Williams*, 705 F.2d 603, 619-622 (2d Cir.), cert. denied, No. 83-256 (Dec. 5, 1983); *United States* v. *Myers*, 692 F.2d 823, 836-843 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). Petitioners' contention is equally insubstantial.

Petitioners advance essentially two arguments in support of this contention. First, they insist that the government's role in designing and operating the criminal scheme was excessive and that the government "created" crimes that would otherwise not have occurred (see 83-1891 Pet. 18-19, 20-21; 83-1892 Pet. 10, 12). While it is true that the undercover agents conceived important aspects of the criminal scheme, and that the crimes would not have occurred in this form if the government had not been involved, that is routinely true of undercover operations and has never been thought sufficient to bar a prosecution. It is well settled that the government does not violate the Due Process Clause merely by providing a predisposed defendant with the means and the opportunity to commit a crime. See *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Russell*, 411 U.S. 423, 435-436 (1973); *Sherman*, 356 U.S. at 372; *Sorrells* v. *United States*, 287 U.S. 435, 441 (1932). That is all the agents did here; by acting as representatives of a wealthy person who was willing to pay bribes to obtain political favors, the agents reproduced circumstances likely to arise in reality and provided political figures who were willing to be corrupted with an opportunity to reveal their true colors.

The second argument petitioners advance in support of their contention that the Due Process Clause bars their convictions is, essentially, the same argument they advanced in support of their entrapment claim — that they were not predisposed to commit the acts charged. See 83-1891 Pet. 19; 83-1892 Pet. 11. Specifically, petitioners insist that Abscam was "designed to lure innocent persons into its web" (83-1891 Pet. 19; see 83-1892 Pet. 10) and that "extreme pressure" was brought to bear on petitioners to accept the bribes (83-1891 Pet. 19; see 83-1892 Pet. 11). But the question whether the government has pressured innocent persons into committing crimes is properly comprehended by the entrapment defense. As we have explained, there is abundant support for the jury's conclusion that petitioners were predisposed beyond a reasonable doubt to accept illicit payments and that they did not succumb to excessive government pressure.

In general, the record in this case shows that there was nothing questionable or improper about any aspect of the operation that led to petitioners' convictions. The undercover agents acted in the way that would be expected of any person seeking to exchange money for political favors. They made contact only with persons whom they had reason to believe would be susceptible to corruption, although there was no constitutional requirement that they limit their investigation in this way. As the court of appeals explained (Pet. App. 88-90), the sums they offered cannot be regarded as excessive. Petitioners object that Criden was paid on a contingent fee basis and that his actions were not supervised (83-1891 Pet. 19; 83-1892 Pet. 11); but they suggest no reason to doubt that a middleman like Criden — to whom, of course, the agents did not reveal their true identity — would receive a contingent fee from persons actually interested in corrupting politicians. Nor do petitioners explain how the agents could have supervised Criden or paid him on another basis without compromising the undercover operation.

Similarly, petitioner Jannotti objects that the government did not obtain a sufficiently explicit statement from him to the effect that he understood the corrupt nature of the agreement (83-1891 Pet. 21). But as the Second Circuit explained in an Abscam case that involved members of Congress (*Myers*, 692 F.2d at 843-844):

> Undercover agents offering bribes to Congressmen are entitled to simulate the guarded conversation that would be expected of those proposing an unlawful venture. * * * They need not say, "Congressman, I have here a cash bribe to be exchanged for your corrupt promise to be influenced in your official action."

Indeed, in another phase of the Abscam operation, Mayor Errichetti criticized another of the sheik's representatives for being insufficiently subtle in offering a bribe to an official. *United States* v. *Myers*, 527 F. Supp. 1206, 1227 n.17 (E.D.N.Y. 1981), aff'd in part and rev'd and remanded in part, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). Here, the jury, after viewing the videotape, evidently concluded that petitioners' insistence that the hotel project be legitimate reflected only their desire not to commit themselves to public support of an embarrassing project, and that Jannotti's too frequent protestations that he was seeking only to aid Philadelphia were nothing more than an effort to avoid making a directly incriminating statement and were belied by his ready acceptance of a cash payment he obviously expected.

Finally, petitioners contend that they were subject to unfair pressure because the agents appealed to their "civic duty" and suggested that the hotel would not be built if they did not accept the payments (83-1891 Pet. 19; 83-1892 Pet. 11). As the court of appeals demonstrated, no such suggestion was ever made to Schwartz, and the agents' remarks to Jannotti, taken as a whole, not only did not place unfair pressure on him but gave the clear impression that the hotel would be built in Philadelphia no matter how Jannotti responded (Pet. App. 96-99). In any event, even if the agents had made the project contingent on petitioners' acceptance of the payments, their actions would not have created temptations and pressures exceeding those with which municipal officials are sometimes faced; and such officials scarcely do their "civic duty" when they accept a large cash payment instead of reporting such an incident to the authorities.

This Court made it clear in *Hampton* v. *United States, supra*, that government involvement in a criminal scheme would bar the conviction of a predisposed defendant only in the most extraordinary case, if at all. See 425 U.S. at 495 n.7 (Powell, J., concurring). Since *Hampton* was decided, there has been only one occasion on which a court of appeals has held that a prosecution was precluded on this ground, and that decision was reached by the Third Circuit itself. *United States* v. *Twigg*, 588 F.2d 373 (1978). In this case, the Third Circuit, en banc, convincingly distinguished *Twigg*. See Pet. App. 108-110. Further review of the due process claim by this Court is plainly unwarranted.

3. Petitioners also contend (83-1891 Pet. 23-25; 83-1892 Pet. 14-20) that their convictions should be reversed because of an erroneous instruction on entrapment. The instruction was as follows (Pet. App. 18):

> If you find from the evidence that there was inducement, that the crime was induced by the Government agents * * * you would therefore acquit the defendants unless the evidence as a whole satisfies you beyond a reasonable doubt that they were predisposed.
>
> In short, the burden is upon the Government in a case of this kind to prove beyond a reasonable doubt that there was no entrapment. If the defendants were induced to commit the crime, then they were entrapped and should be acquitted unless the Government satisfies you beyond a reasonable doubt that they were predisposed to commit the crime.

The court of appeals ruled that while this instruction correctly placed on the goverment the burden of proving predisposition beyond a reasonable doubt, it was erroneous in two respects: it separated the issues of inducement and predisposition, and it did not clearly state that the jury was to find inducement unless the government proved lack of inducement beyond a reasonable doubt (Pet. App. 20-21). See *United States* v. *Watson*, 489 F.2d 504, 510, 511 (3d Cir. 1973).

Even though it ruled that tne instruction was erroneous, the court of appeals unanimously declined to reverse petitioners' convictions, for the following reasons (Pet. App. 21-22):

> We are not confronted here with an error affecting the defendants' constitutional rights. The entrapment defense "is not of a constitutional dimension," *United States* v. *Russell*, 411 U.S. 423, 433 (1973), and the erroneous instruction affected no other possible constitutional right. We are therefore not required in this appeal to find beyond a reasonable doubt that the error was harmless. *Chapman* v. *California*, 386 U.S. 18 (1967). Instead, we must use the "highly probable" standard of appellate review discussed [in] *Government of Virgin Islands* v. *Toto*, 529 F.2d 278, 284 (3d Cir. 1976). Applying this standard to the circumstances of this case, we hold that the erroneous instruction is not reversible. * * * As noted above, the district court charged the jury that it was obligated to acquit the defendants if the government failed to disprove entrapment beyond a reasonable doubt. This part of the charge was correct.
>
> The charge was erroneous insofar as the district court improperly required the defendants to show some evidence of inducement, either by introducing their own proof or by reference to the government's evidence. This evidence, however, was patent: the government had created an elaborate fiction to convince the defendants that an Arab sheik was prepared to pay bribes to local officials in exchange for favors.
>
> The district court correctly placed on the government the burden of proving predisposition beyond a reasonable doubt. We find that the government's evidence established overwhelmingly that the defendants enthusiastically accepted bribes. There simply is no

> credible evidence that the defendants were reluctant to take the money. To the contrary, the evidence shows the defendants, each of them an elected public official, boasting of their power and their corruption. In view of this overwhelming proof, we conclude without hesitation that the defendants were not prejudiced by the district court's error.

While we do not necessarily agree with the court of appeals that the instruction was erroneous (see *United States* v. *Sherman*, 200 F.2d 880, 882-883 (2d Cir. 1952) (L. Hand, J.), rev'd on other grounds, 356 U.S. 369 (1958)), the court's conclusion that any error was harmless plainly does not merit further review. The instruction did not explicitly place on petitioners the burden of proving any element of the entrapment defense; on the contrary, it explicitly required the government to disprove entrapment beyond a reasonable doubt. Petitioners themselves repeatedly emphasize, in connection with their other contentions, "[t]he extraordinary degree of government inducement in this case" (83-1891 Pet. 25; see *id.* at 13, 18-22; 83-1892 Pet. 9-14, 21, 23); it is most unlikely that the jury's conclusion was affected by the fact that the instruction did not unequivocally place on the government the burden of proof on the inducement issue.

In any event, the court of appeals' conclusion that the alleged error was harmless is based on the particular facts of this case. Contrary to petitioners, there is no conflict among the circuits on the harmless error standard that should be applied; indeed, that standard is derived directly from this Court's decision in *United States* v. *Kotteakos*, 328 U.S. 750, 764-765 (1946). See *Government of the Virgin Islands* v. *Toto*, 529 F.2d 278, 283-284 (3d Cir. 1976).[5] But even if there were a conflict, it seems clear beyond a reasonable doubt that any error in connection with the instruction on inducement would not have affected the jury's verdict in the circumstances of this case.

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[5] Many of the cases cited by petitioner Schwartz (83-1892 Pet. 17-18) deal not with entrapment but with other defenses or with the government's proof of an element of the offense. Moreover, in each of these cases the instruction utterly failed to mention the government's burden

4. The Hobbs Act, 18 U.S.C. 1951(a), provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article * * * in commerce, by * * * extortion or attempts or conspires so to do" is guilty of a crime. Petitioners were convicted of conspiracy to violate the Hobbs Act. They contend (83-1891 Pet. 10-16;

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of proof beyond a reasonable doubt in connection with the defense (or mentioned it only in a highly confusing fashion). See *Davis* v. *United States*, 160 U.S. 469 (1895) (sanity; burden of proof erroneously placed on defendant); *United States* v. *Read*, 658 F.2d 1225, 1236-1239 (7th Cir. 1981) (membership in conspiracy); *Berrier* v. *Egeler*, 583 F.2d 515, 517-518 (6th Cir.), cert. denied, 439 U.S. 955 (1978) (self-defense); *United States* v. *Alston*, 551 F.2d 315 (D.C. Cir. 1976) (alibi); *United States* v. *Corrigan*, 548 F.2d 879 (10th Cir. 1977) (self-defense). By contrast, the district court here clearly instructed the jury that the government had to prove entrapment beyond a reasonable doubt and that it had to prove predisposition beyond a reasonable doubt.

Contrary to petitioner Schwartz (83-1892 Pet. 18), nothing in *United States* v. *Benavidez*, 558 F.2d 308 (5th Cir. 1977), suggests that even a complete failure to give an entrapment instruction is constitutional error. And none of the cases cited by petitioners (83-1891 Pet. 24-25 n.16; 83-1892 Pet. 19) establishes a rule of automatic reversal for an erroneous instruction on entrapment. Indeed, most of the cases cited by petitioner in which the court held an entrapment instruction to be erroneous involved a failure by the court to instruct clearly that the government had the burden of proving predisposition beyond a reasonable doubt. See *United States* v. *Dearmore*, 672 F.2d 738, 740-741 (9th Cir. 1982); *United States* v. *Wolffs*, 594 F.2d 77, 79-84 (5th Cir. 1979); *United States* v. *Ambrose*, 483 F.2d 742, 753 (6th Cir. 1973); *Notaro* v. *United States*, 363 F.2d 169 (9th Cir. 1966). We note that in *Ambrose* the court appears to have approved an instruction like that given here (483 F.2d at 753 n.7). In *United States* v. *Tate*, 554 F.2d 1341, 1343-1345 (5th Cir. 1977), the court explicitly applied a harmless error standard.

83-1892 Pet. 24-28) that because the hotel project in connection with which they accepted the illicit payments was fictitious, their acts could not have affected interstate commerce and therefore did not constitute a conspiracy to violate the Hobbs Act.

Petitioners rely heavily (see 83-1891 Pet. 11; 83-1892 Pet. 24-25) on *United States* v. *Staszcuk*, 517 F.2d 53 (7th Cir.) (en banc) (Stevens, J.), cert. denied, 423 U.S. 837 (1975). Petitioners are correct that *Staszcuk* has been generally followed by other circuits, but the holding and reasoning of *Staszcuk* are decisively contrary to petitioners' contention. In *Staszcuk*, the defendant, a local official, received $3,000 in exchange for his support of a zoning change that would have enabled an animal hospital to be built, but the hospital was never built. "Therefore, there [was] no evidence that either the zoning change or the payment had any effect whatsover, either favorable or unfavorable, on interstate commerce." 517 F.2d at 55. The court nonetheless *upheld* the defendant's conviction for a substantive violation of the Hobbs Act. The court stated (*id.* at 59-60; footnotes omitted):

> We are * * * persuaded that the cases which uniformly hold that a threatened effect on interstate commerce is sufficient to bring the statute into play notwithstanding the absence of any actual effect, correctly interpret the congressional purpose. * * * [T]he commerce element of a Hobbs Act violation * * * may be satisfied even if the * * * extortion had no actual effect on commerce.

Under this reasoning, petitioners' convictions must also be upheld.

Petitioners emphasize the statement in *Staszcuk* that Hobbs Act "jurisdiction in [a] particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce" (517

F.2d at 60). But by this the court could only have meant a realistic probability that the contemplated transaction, if it had come to pass, would have affected commerce. The court could not have meant that the jury had to assess the likelihood that the hospital would actually be built; the court noted that the record did not explain why the hospital was never built, and it is implausible to suppose that the result in *Staszcuk* would have been different if the evidence showed that the builder's desire to construct the hospital was not a serious intention but only a velleity, or that, as a practical matter, he was never in fact in a position to build the hospital.

Moreover, unlike the defendant in *Staszcuk*, petitioners were convicted of conspiracy, not of a substantive violation of the Hobbs Act. Petitioners appear to recognize, as they must, that they could be prosecuted for conspiracy to violate the Hobbs Act even if their actions had no actual effect on interstate commerce; "the illegality of [a conspiratorial] agreement does not depend on the achievement of its ends." Pet. App. 73 (citing cases). The distinction petitioners apparently seek to draw is between a conspiracy that *did not* affect commerce and one that *could not possibly* have affected commerce. But as the court of appeals noted (*id.* at 75-76), this is an effort to import a defense of impossibility into the law of conspiracy — a defense that has been consistently rejected. See, *e.g., United States* v. *Rindone*, 631 F.2d 491, 492-494 (7th Cir. 1980) (upholding Hobbs Act conviction of municipal employee who extorted a payment even though payment was made from funds supplied by FBI and therefore could not have affected interstate commerce); *United States* v. *Waldron*, 590 F.2d 33 (1st Cir.), cert. denied, 441 U.S. 934 (1979) (upholding conviction for conspiracy to transport stolen goods worth more than $5,000 even though, unknown to conspirators, goods were actually worth less than $5,000); *United States* v. *Rose*, 590

F.2d 232, 235-236 (7th Cir. 1978), cert. denied, 442 U.S. 929 (1979) (upholding convictions for conspiracy to transport stolen goods even though the persons engaged by conspirators to commit the thefts were FBI agents who never intended to do so); *United States* v. *Thompson*, 493 F.2d 305, 310 (9th Cir.), cert. denied, 419 U.S. 834 (1974) (upholding conviction for conspiracy to smuggle marijuana even though substance not shown to be marijuana). Petitioners cite no authority to the contrary.

Finally, the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960); see *Staszcuk*, 517 F.2d at 58. As petitioners appear to recognize, therefore, it necessarily follows from their contention that Congress would lack the power under the Commerce Clause to punish the conduct at issue here. This proposition is plainly incorrect. See *Perez* v. *United States*, 402 U.S. 146, 154-155 (1971). As the court of appeals explained, there is no reason to distinguish the conduct shown in this record from other schemes that Congress undoubtedly could reach and has included within the proscriptions of the Hobbs Act (Pet. App. 78-79):

> [Petitioners] agree that had the government moved from the verbal ruse that its agents were in the hotel construction business to the more concrete action of embarking on that venture * * * the jurisdictional requirement would have been met. However, we see no reason to interpret Congress' legislative power as dependent upon whether the F.B.I. agents actually contract for a hotel site * * *. To require that the government take that additional step before it can constitutionally reach a proved conspiracy which would have affected interstate commerce had the facts

> been as represented misdirects the focus of the conspiracy cases. * * *
>
> In this case the jury found that [petitioners] conspired to violate the Hobbs Act by their acceptance of payments in return for their promises to expedite completion of an elaborate hotel project which, had it been constructed, would have entailed at least a $30 million expenditure. Had the project actually been planned as represented, [petitioners'] actions would have violated the Hobbs Act even if unforeseen difficulties, such as the overthrow of the "sheik," prevented any further action on the project. The federal interest in protecting interstate commerce is no less under the factual situation presented in this case. The threat posed by [petitioners'] actions is just as great.

Moreover, there can be no dispute that the Commerce Clause gives Congress the power not just to punish actual interferences with interstate commerce but to use the criminal law to attempt to deter those who would interfere with commerce. Congress could reasonably conclude that imposing criminal liability on those who engage in the conduct shown by this record would serve a powerful deterrent purpose and thereby protect interstate commerce from extortionate official behavior.

5. Finally, petitioners contend (83-1891 Pet. 16-17; 83-1892 Pet. 28-30) that their Hobbs Act convictions should be reversed because they did not "induce" or "demand" the illicit payments but instead were merely "passive" recipients. As the court of appeals demonstrated, quite apart from the merits of petitioners' interpretation of the Hobbs Act, this characterization of petitioners' role is manifestly incorrect (Pet. App. 82; citations omitted):

> Even if the Hobbs Act were to be construed as requiring some inducement on the part of the public official, [petitioners'] conduct in this case hardly constituted

> merely passive acceptance of the payments. The evidence does not fit [petitioners'] posited illustration of an unexpected bribe mailed to a public official's office. On the contrary, rather than remaining in their own offices, the evidence shows that each [petitioner] arrived at the * * * [agents'] suite after having been briefed about the purported hotel project, the fact that there would be a payment made, and the specific amount of the payment which would be made to each. * * * As soon as each defendant was in the * * * suite, Wald, the F.B.I. agent, promptly repeated the need for * * * assurances. Thereafter, Schwartz launched into a discourse on his own importance and power and his ability to control City Council and the relevant municipal offficals and departments, and Jannotti also confirmed his own power. Further, each gave assurances that there would be no obstacles or that the obstacles, if any, would be manageable.

After repeatedly being told that the sheik's representatives were seeking assurances, and responding with boasts about their power and expressions of their intention to cooperate, petitioners were handed envelopes containing, respectively, $30,000 and $10,000 in cash, and they accepted without hesitation. In light of this videotaped record, it is wholly implausible to suggest that petitioners were passive recipients of "gifts" they did nothing to induce.

Petitioners identify no conflict among the circuits on the question whether the Hobbs Act requires the government to show that a public official somehow "induced" the payment. Petitioners cite cases (83-1891 Pet. 16 & n.10; 83-1892 Pet. 29 & n.25) in which government officials were convicted under the Hobbs Act after having been charged with inducing payments. But petitioners do not cite any case in which a conviction under the Hobbs Act was set aside because the indictment failed to charge (or the jury instructions failed to require the government to show) that defendants who were public officials induced the illicit payment.[6]

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[6] In *United States* v. *O'Grady*, No. 82-1344 (July 12, 1984) (en banc), the Second Circuit reversed a Hobbs Act conviction, stating that "there must * * * be proof that the public official did something, under color of his public office, to cause the giving of benefits" (slip op. 7655). The Second Circuit also said (*id.* at 7659) that in the present case, the Third Circuit ruled that inducement was not necessary. (In fact, the court of appeals in the present case noted only that its prior cases contained the "suggestion that there need be no inducement" (Pet. App. 81).) But the Second Circuit distinguished the present case on the ground that the evidence here "establish[ed] conduct from which inducement can be readily inferred" (slip op. 7660).

The trial court in *O'Grady* specifically instructed the jury that the government "need not show that the defendant in words or otherwise, induced, requested, demanded, or solicited the benefits" (slip op. 7653). The trial court also instructed the jury that in order to convict it need find only that benefits were conferred because the defendant was a public official and that the defendant knew that the benefits were conferred for this reason (*id.* at 7652-7653). It was these instructions that the Second Circuit found to be incorrect. No comparable instructions were given in this case. See Pet. App. 238.

In fact, the district court told the jury that they should convict only if they found a conspiracy "to receive payments in the nature of bribes, that is to say extortion, from the hotel enterprise" (*id.* at 268) and that a particular defendant could be convicted of the Hobbs Act conspiracy only if he knew "that it was an object of the conspiracy that their intent was to so solicit or receive bribes which would amount to extortion and impede interstate commerce" (*id.* at 271). We note that petitioners do not now challenge the jury instruction and indeed appear to endorse the interpretation of the Hobbs Act put forward by the district court in its opinions (see 83-1891 Pet. 26; 83-1892 Pet. 29).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1984